

THE MARYLAND JUDICIAL COMMISSION

ON

PROFESSIONALISM

REVISED

FINAL REPORT

AND

RECOMMENDATIONS

The Honorable Lynne A. Battaglia
Chair

Norman L. Smith, Esq.
Reporter

May 30, 2007

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SUBCOMMITTEES

Standards of Professional Conduct, Including Identifying Indicia of Professionalism

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Mike Preston
William P. Young, Jr.

Professionalism Guidelines and Sanctions for Use by Judges

C. Daniel Saunders, Chair
The Hon. Richard D. Bennett
Prof. Abraham Dash
Robert L. Ferguson, Jr.
Robert J. Greenleaf
Master Cornelius Helfrich
The Hon. Benson E. Legg
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Discovery Abuse Issues, Including The Use of Discovery Masters

Dana O. Williams, Chair
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Robert L. Ferguson, Jr.
Linda Sorg Ostovitz
Danny R. Seidman
Daryl T. Walters

Mentoring

The Hon. James P. Salmon, Chair
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Felecia L. Greer
Linda Sorg Ostovitz
Dwight W. Stone
Prof. Byron Warnken

SUBCOMMITTEES

Update Existing Professionalism Course for New Admittees

Deborah L. Potter, Chair
Mark J. Davis
David W. Densford
William H. Jones
Michael F. O'Connor

Development of a Professionalism Course for Lawyers Who Exhibit Unprofessional Behavior

Norman L. Smith, Chair
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Defining the Unauthorized Practice of Law

Linda H. Lamone, Chair
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Judges' Role in the Bar and With Communities

The Hon. Jeannie Hong, Chair
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William Hudson
Randy Jackson
Steven P. Lemmey
James Otway
Danny R. Seidman

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Note: Both this Revised Final Report and the initial Final Report dated May 31, 2006, with its Appendices, can be found on-line at <http://mdcourts.gov/professionalism/index.html>.

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REVISED EXECUTIVE SUMMARY

On April 25, 2002, in response to a recommendation by the Maryland State Bar Association that all licensed Maryland attorneys be required to complete a mandatory continuing legal education course on professionalism, Chief Judge Robert M. Bell of the Maryland Court of Appeals established the Maryland Judicial Task Force on Professionalism. The Task Force was composed of twenty-four Maryland lawyers: one from each Maryland jurisdiction and a lawyer reporter.

After an initial organizational meeting, the Task Force, led by Court of Appeals Judge Lynne A. Battaglia, embarked upon a state-wide “self study” of the concept of professionalism. This was accomplished through a series of town meetings held in each Maryland jurisdiction. The first meeting was held in September 2002 in Howard County, and the last in July 2003 in Cecil County. Chief Judge Bell was present at each meeting, along with Judge Battaglia, Task Force reporter Norman Smith, and Jacqueline Lee, Assistant to Judge Battaglia. Participants included many District, Circuit, and Appellate judges, as well as practicing lawyers.

The Task Force found a near unanimous perception that professionalism in our profession has declined over the years. In order to further professionalism as an important core value, the Task Force recommended that a Professionalism Commission be established and that the Commission, drawing on the findings of the Professionalism Task Force, identify indicia of professionalism, develop standards of professional conduct to be published to the bench and Bar, and study specific ways to improve professionalism throughout the State.

On November 10, 2003, the Maryland Court of Appeals adopted the Professionalism Task Force’s recommendation to establish a Professionalism Commission. Meeting for the first time in March 2004, the Professionalism Commission, through eight subcommittees, has acted upon the recommendations of the Professionalism Task Force. Judge Battaglia chairs the Commission and Norman Smith is the lawyer-reporter.

The Commission’s charge is to act on the findings of the Task Force: professionalism is more than ethics; there is a higher standard to be achieved by lawyers; specific indicia of professionalism must be identified. The Commission studied all facets of professional conduct and formulated methods to raise professionalism standards in the legal community. In considering courses of action, the Commission examined the work of other states in the area of professionalism and evaluated the effectiveness of their policies.

The Commission divided its members into eight subcommittees to focus on areas of concern that were identified by the Professionalism Task Force:

- Standards and Ideals of Professionalism
- Professionalism Guidelines and Sanctions for Use by Judges
- Discovery Abuse
- Mentoring
- Update Existing Professionalism Course for New Admittees

- Development of a Professionalism Course for Lawyers Who Exhibit Unprofessional Behavior
- Defining the Unauthorized Practice of Law
- The Judge's Role in the Bar and in the Community

The Subcommittee on Standards and Ideals of Professionalism examined the Rules of Professional Conduct in Maryland, the Model Rules, and Rules in other states. The Subcommittee also researched other states' professionalism guidelines and produced recommended Standards of Professionalism.

The Subcommittee on Professionalism Guidelines and Sanctions for Use by Judges determined that judges do not use existing tools effectively and do not have other necessary tools with which to sanction unprofessional behavior. To remedy the situation, the Subcommittee recommended specific changes to the Rules of Professional Conduct, the Maryland Rules of Procedure, and the Judicial Canons.

The Subcommittee on Discovery Abuse evaluated existing methods of resolving discovery disputes and addressing discovery abuse. After studying discovery problems in all jurisdictions, the Subcommittee made certain recommendations, including the use of special masters (lawyers or retired judges) to become involved in the process of promptly resolving discovery disputes.

The Subcommittee on Mentoring recommended exposure to professionalism concerns as early as possible, beginning at the law school level. The Subcommittee evaluated current mentoring programs in the State and noted that, while existing programs are in place, these programs are underutilized by new attorneys. The subcommittee recommended ways to increase awareness that such programs exist as well as to create opportunities for young attorneys to list their questions on professionalism and ethics and have them answered by competent attorneys. The Subcommittee also recommended that mentors be teamed up with new lawyers by means of a questionnaire handed out at the required professionalism course for new admittees.

The Subcommittee to Update the Existing Professionalism Course for New Admittees evaluated the current professionalism course for new admittees who pass the Bar and debated the effectiveness of postponing the course until attorneys have practiced for at least one year. Although there is much to be said for allowing attorneys to gain some experience before taking the course, the Subcommittee determined that the change is not workable at this time.

The Subcommittee on the Development of a Professionalism Course for Lawyers Who Exhibit Unprofessional Behavior examined fourteen other jurisdictions, as well as existing policies in Maryland, to determine a course of action that would work to correct the behavior of errant attorneys within the State. After identifying numerous problem areas with a comprehensive course, the Subcommittee recommended that a counseling program for lawyers offers a more workable solution.

The Subcommittee to Define the Unauthorized Practice of Law examined the scope of known occurrences of unauthorized practice of law (UPL) and the generally expressed concern that some in the real estate field, banking, accountancy, and other non-legal professions may be engaging in the unauthorized practice of law. After a study of treatment of these issues in other states and consultation with Bar Counsel of the Attorney Grievance Commission and attorneys from the Office of the Attorney General, the Subcommittee determined that it is neither necessary nor wise to change the statutory definition of the practice of law. The Subcommittee also cautioned that the profession risks the appearance of “turf protection” if aggressive enforcement is not perceived as protection of the public. The Subcommittee made other specific recommendations for monitoring the unauthorized practice of law and stimulating increased awareness and recourse for the public, the courts and members of the Bar, including public relations efforts, establishment of a clearing house for complaints, mechanisms for review of complaints and, where appropriate, prosecution of the unauthorized practice of law.

The Subcommittee on the Judges’ Role in the Bar and with the Community studied ways to integrate judges into the legal community while maintaining judicial integrity and independence. The Subcommittee determined that the age-old practice in which judges are isolated from practicing lawyers in the legal community is no longer a desired ideal. The Subcommittee examined the canons and rules for judges and evaluated activities currently permitted for judges, such as serving on boards, commissions, participating in Bar activities and teaching.

After submitting its original Report to the Court in June of 2006, members of the Commission set up town meetings inviting judges and practicing lawyers representing 24 jurisdictions to attend and to give feedback regarding the Report. Judge Battaglia explained at each meeting that, although the Report was filed with the Court of Appeals, it would not become final until the Commission considered the comments, criticisms, and proposed changes to the Report by members of the Bench and Bar throughout the State. Attached to this Report are the comments made by the attendees, broken down by Subcommittee subject matter, as well as the minutes of each of the 22 town hall meetings, which included attorneys from all of the 24 jurisdictions.

Specifically, the Subcommittees focused their reconsideration on the following suggestions, proffered during the Town Hall meetings:

- Revise the Standards of Professionalism into sharper, crisper, mandatory rubrics that a violation of the Standards might fairly be subject to sanctions; provide procedural due process guidelines to complement proposed sanctions for violations of the Standards; better define the words “repeated” and “egregious” in the language of the Sanctions;
- Specify the means and process for bringing discovery disputes to a speedy resolution; recommend that hearings not be required to resolve all discovery motions and, where necessary, that a hearing be held quickly;
- Consider again a Professionalism Course for experienced attorneys;

- Provide more specific recommendations regarding the proposed counseling program for errant attorneys at the County Bar Association level to include a procedure for referral to counseling and reconsider the confidentiality of records after counseling in order to identify repeat offenders;
- Encourage cooperation with Judge Greene's Commission on pro se litigants;
- Consider the imposition of professionalism standards for judges and clarify the rules regarding participation of the judiciary in community organizations that raise donated funds, and
- Address the perception that the Report has a litigation orientation and bias.

When the Town Meetings were completed, the Subcommittees met and reported their recommendations at two meetings of the Commission, one on January 10, 2007 and another on March 21, 2007. At the first of the two meetings, the Commission requested that the Subcommittee on Standards of Professionalism draft a Civility Code, separate from the Standards, the violation of which could be subject to sanctions. The Commission also asked that the Sanctions Subcommittee draft a comment to proposed new Rule 1-342. In addition, the Commission determined that the report of the Subcommittee on the Judges' Role in the Community should address professionalism concerns regarding judges.

On March 21, 2007, the Commission considered and voted on draft language related to all of these changes, the final text of which was adopted on May 16, 2007. The revised language is now included in the Sections of the Report where it is applicable. The Commission also included in an Appendix the Judicial Professionalism Self-Assessment Tool, provided by the Judicial Administration Section Council of the Maryland State Bar Association, and drafted by the Honorable Robert C. Nalley of the Circuit Court for Charles County, and Masters Catherine T. Beck and Mary M. Kramer.

RECOMMENDATIONS

I. STANDARDS OF PROFESSIONALISM

The Commission recommends that the Court adopt the Standards of Professionalism as an Appendix to the Rules of Professional Conduct.

Standards of Professionalism

Professionalism is the combination of the core values of personal integrity, competency, civility, independence, and public service that distinguish lawyers as the caretakers of the rule of law.

Preamble

When we, as lawyers, are entrusted with the privilege of practicing law, we take a firm vow or oath to uphold the Constitution and laws of the United States. Lawyers enjoy a distinct position of trust and confidence which, concomitantly, carries the significant responsibility and obligation to be caretakers for the system of justice that is essential to the continuing existence of a civilized society. Each lawyer, therefore, as a custodian of the system of justice, must be conscious of this responsibility and exhibit traits that reflect a personal responsibility to recognize, honor and enhance the rule of law in this society. The standards and characteristics set forth below are representative of a value system that we must demand of ourselves as professionals in order to maintain and enhance the role of legal professionals as the protectors of the rule of law.

A. Ideals of Professionalism¹

As a lawyer, I will aspire to:

- Put fidelity to clients before self-interest.
- Model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.
- Avoid all forms of wrongful discrimination in all of my activities, including discrimination on the basis of race, religion, sex, age, handicap or national origin. Equality and fairness will be goals for me.
- Preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.

¹ Based upon the model from the State of Georgia.

- Make the law, the legal system, and other dispute resolution processes available to all.
- Practice law with a personal commitment to the rules governing our profession and to encourage others to do the same.
- Preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.
- Achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.
- Practice law not as a business, but as a calling in the spirit of public service.

R	Responsibility
E	Excellence
S	Service
P	Promotion of fairness
E	Education
C	Civility/Courtesy
T	Trustworthiness

Responsibility and Trustworthiness (integrity, honesty, trust)

A lawyer should understand that:

1. Punctuality promotes the credibility of a lawyer. Tardiness and neglect denigrate the individual as well as the legal profession.
2. Personal integrity is essential to the honorable practice of law. Each lawyer should ensure that clients, opposing counsel, and the court can trust that the lawyer will keep all commitments and perform the tasks promised.
3. Honesty and candid communications promote credibility with the court, with opposing counsel and with clients.
4. External monetary pressures that may cloud professional judgment should be resisted.

Education and Excellence

A lawyer should:

1. Make constant efforts to expand his/her legal knowledge and to ensure familiarity with

changes in the law that affect a client's interests.

2. Willingly take on the responsibility of promoting the image of the legal profession by educating each client and the public regarding the principles underlying the justice system, and, as a practitioner of a learned art, by conveying to everyone the importance of professionalism.
3. Attend continuing legal education programs to demonstrate a commitment to keeping abreast of changes in the law.
4. As a senior lawyer, accept the role of mentor and teacher, whether through formal education programs or individual mentoring of newer attorneys.
5. Understand that mentoring includes the responsibility for setting a good example for another lawyer as well as an obligation to ensure that each mentee learns the principles enunciated in these standards and adheres to them in practice.

Service

A lawyer should:

1. Serve the public interest by clearly communicating with clients, opposing counsel, judges, and members of the public.
2. Give consideration to the impact on others when scheduling events. Reasonable requests for schedule changes should be accommodated if it does not impact the merits of the case.
3. Maintain an open dialogue with clients and opposing counsel.
4. Respond to all communications promptly, even if more time is needed to locate a complete answer. Delays in returning telephone calls may leave the impression that the call was unimportant or that the message was lost and leads to an elevation in tension and frustration and less effective communication.
5. Keep a client apprised of the status of important matters affecting the client and inform the client of the frequency with which information will be provided (some matters will require regular contact, while others will require only occasional communication).
6. Always explain a client's options or choices with sufficient detail to help the client make an informed decision.
7. Reflect a spirit of cooperation and compromise in all interactions with opposing counsel, parties, staff, and the court. This requires a reduction in the win/loss approach to issues and an increase in mediation and achieving success for all involved.

8. Accept the responsibility personally to ensure that justice is available to all citizens of this country and not only to those with financial means.

Promotion of fairness

A lawyer should:

1. Act fairly in all dealings as a means of promoting the system of justice established in this country.
2. Understand that an excess of zeal may undermine a client's cause and hamper the administration of justice. A lawyer can zealously advocate the client's cause in a manner that remains fair and civil.
3. Know that zeal requires only that the client's interests are paramount and therefore utilizes negotiation and compromise to achieve a beneficial outcome. Yelling, intimidating, and issuing ultimatums, and using an "all or nothing" approach amounts to nothing more than bullying, not zealous advocacy.
4. Seek to maintain sympathetic objectivity when advising a client so that the client receives a comprehensive view of the legal aspects of the situation presented to the lawyer.
5. Not allow any action or decision to be governed by a client's improper motive and challenge a client whose wishes are unethical or ill advised. This becomes especially important when deciding whether to consent to an extension of time requested by an opponent. The attorney makes that choice based on the effect, if any, on the outcome of the client's case and not based on the acrimony that may exist between the parties.
6. Negotiate in good faith in an effort to avoid litigation and suggest alternative dispute resolution when appropriate.
7. Use litigation tools to strengthen the client's case and avoid using litigation tactics in a manner solely to harass, intimidate, or overburden an opposing party.
8. Explicitly note any changes made to documents submitted for review by opposing counsel. Fairness is undermined by attempts to insert or delete language without notifying the other party or his attorney.

Civility and Courtesy

A lawyer should understand that:

1. Professionalism requires civility in all dealings, showing respect for differing points of view, and demonstrating empathy for others.

2. Courtesy does not reflect weakness, but promotes effective advocacy by ensuring that parties have the opportunity to participate in the process without personal attacks or intimidation.
3. Maintaining decorum in the courtroom is neither a relic of the past nor a sign of weakness, but is an essential component of the judicial process.
4. It is essential to prepare scrupulously for meetings and court appearances and show respect for the court, opposing counsel, and the parties through courteous behavior and respectful attire.
5. Courtesy and respect should be demonstrated in all contexts, not just with clients and colleagues, or in the courtroom, but with support staff and court personnel.
6. Hostility between clients should not become grounds for an attorney showing hostility or disrespect to a party, opposing counsel, or the court.
7. Patience enables a lawyer to exercise restraint in volatile situations and to diffuse anger rather than to elevate the tension and animosity between parties or attorneys.

B. Rules of Professionalism

1. A lawyer shall treat all persons with courtesy and respect and at all times abstain from rude, disruptive and disrespectful behavior, even when confronted with rude, disruptive, and disrespectful behavior.
2. A lawyer shall speak and write civilly and respectfully and without intentional distortion or falsehood in all communications with the court, public bodies and agencies, clients, and colleagues.
3. A lawyer shall refrain from manifesting bias or prejudice by words or conduct.
4. A lawyer shall be punctual and prepared for all court appearances and meetings, so that hearings, conferences, depositions, trials, and negotiations may commence on time.
5. A lawyer shall comply with schedules or deadlines set by the court. In non-litigation settings, a lawyer shall respond timely to inquiries from opposing counsel or negotiate a reasonable time in which to respond.
6. Agreement to a date for a meeting or conference represents a commitment that shall be honored, absent compelling circumstances. When compelled to cancel such a date, a lawyer shall notify all concerned as early as possible.
7. A lawyer shall show respect for the legal system through appearance, conduct, dress,

and manner.

8. A lawyer shall neither intentionally ascribe to an adversary or opposing party a position he or she has not taken, nor create a “record” of events that in fact have not occurred.
9. A lawyer shall not engage in any improper conduct, intentionally bring disorder or disruption to a hearing, a courtroom, or to any other legal proceeding or transaction.
10. A lawyer shall advise his or her clients and witnesses of the proper conduct expected of them and endeavor to prevent clients and witnesses from creating disorder and disruption in court or any other setting.
11. A lawyer shall act and speak respectfully to all public officials, court personnel, parties, attorneys, and clients with an awareness that they are an integral part of the legal system. A lawyer shall avoid displays of temper toward public bodies, the court, court personnel, parties, attorneys, and clients in all settings.
12. A lawyer shall not seek extensions or continuances for the purpose of harassment or prolonging litigation.
13. A lawyer shall not unreasonably refuse to consent to a reasonable time extension requested by opposing counsel.
14. A lawyer shall not knowingly misrepresent, mischaracterize, misquote, or mis-cite facts or authorities in any written or oral communication in any context, nor rely on facts that are not properly a part of the information available to the parties or placed in a court record.
15. A lawyer shall not disparage the intelligence, ethics, morals, integrity, or personal behavior of opposing counsel in written submissions or oral representations, unless these matters are directly and necessarily in issue.
16. A lawyer shall not seek sanctions against or disqualification of another lawyer for any improper purpose.
17. A lawyer shall adhere to express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances.
18. When committing oral understandings to writing, a lawyer shall do so accurately and completely. A lawyer shall provide other counsel with a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

19. When permitted or required by court rule or otherwise, a lawyer shall draft orders that accurately and completely reflect the court's ruling. A lawyer shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.
20. A lawyer shall not use or oppose discovery for the purpose of harassment or to burden and opponent with increased litigation expense. A lawyer shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

II. PROFESSIONALISM GUIDELINES AND SANCTIONS FOR USE BY JUDGES

In order that judges are provided with uniform professionalism standards and sanctions, the Commission recommends that the Court adopt the following:

A. New Maryland Rule 1-342:

If the court finds that the conduct of any counsel violates the Standards of Professionalism, the Court may impose sanctions as the Court deems appropriate, including the assessment of a monetary civil penalty, a monetary award, or both.

B. A Comment to Rule 1-342:

Rule 1-342 provides the discretion to sanction attorneys who violate the Rules of Professionalism, which are reprinted in the appendix to these rules. Before imposing sanctions, the Court must adhere to procedural due process principles consistent with those required under Rule 1-341. The sanctions that a court may impose are in addition to the Court's contempt powers.

C. Rule 8.4 (h) to the Maryland Rule of Professional Conduct:

Rule 8.4. Misconduct.

It is professional misconduct to:

(h) Repeatedly or egregiously violate the Standards of Professionalism.

D. A Comment to Rule 8.4(h):

Rule 8.4 (h) recognizes professionalism as a core value of the legal profession. It is an essential component in fostering respect for and confidence in the legal process. The fundamental responsibilities of an attorney are set forth in the Standards of Professionalism, which are reprinted as an appendix to these Rules.

E. An addition to Judicial Canon 3:

(3) A judge shall require order and decorum in proceedings and shall report egregious or repeated violations of the Standards of Professionalism to the Attorney Grievance Commission.

III. DISCOVERY ABUSE

To address problems stemming from discovery abuse and unprofessional conduct during discovery, the Commission recommends:

- A. The Maryland State Bar Association revise and expand the *Maryland Discovery Guidelines* to address the concerns reflected in this Report and submit the revised Guidelines to the Rules Committee and to the Court.
- B. The Maryland Judiciary web site be expanded to include discovery opinions from trial courts, in the same manner that the site now publishes opinions from the trial courts in the business and technology case management system.
- C. The Rules Committee expand and annotate the standard discovery forms now found in the Appendix to the Maryland Rules and add a comment that the standard forms are presumptively proper.
- D. The Conference of Circuit Court Judges formulate a uniform discovery protocol designed to ensure that discovery is completed and disputes resolved in a timely fashion, and that the protocol include:
 - 1. At the request of either party in a case, the Court may schedule a discovery conference within 30 days of the filing of an answer. The conference may result in a discovery plan and scheduling order.
 - 2. In Anne Arundel County, Baltimore City, Baltimore County, Montgomery County, and Prince George's County the Administrative Judge appoint a specific judge (consideration to be given to use of retired judges) to handle all discovery disputes and that the discovery judge have authority to assign a discovery master, as necessary, for first-level dispute resolution.
 - 3. In all other counties the Administrative Judge appoint a standing discovery master or assign, as necessary, a special discovery master to the specific case.
- E. Changes in the Maryland Rules to accomplish the following:
 - 1. Facilitate the process for bringing discovery disputes before the Court, including shortening the deadline for filing responses to motions seeking relief in such disputes.

2. After the deadline for a response to motions for discovery relief has passed, provide for prompt referral to the designated judge or discovery master for resolution.
3. Provide procedures for the judge's prompt resolution of exceptions to the discovery master's recommendations.
4. Add to the Rule or Comment that, in resolving discovery disputes, a discovery master or judge may take into consideration any violations of Maryland Discovery Guidelines.

IV. MENTORING

In order to encourage mentoring of new lawyers to promote the ideals of professionalism, the Commission recommends:

- A. The Maryland State Bar Association mentoring program should be revamped so that new admittees who desire mentoring will be assigned a specific mentor.
- B. New admittees may sign up for mentoring at the Professionalism Course held semi-annually.
- C. The Young Lawyers Section of the Maryland State Bar Association should match the mentors and mentees.
- D. A Judicial Experience Program should be established to promote the goals of professionalism.
 1. Students at the two Maryland law schools who enter the Program will attend court with members of the Maryland Judiciary - ALJs, masters, and judges- and learn from the mentor/judge what is expected of a professional.
 2. Students who enter the Judicial Experience Program will do so on a voluntary basis and commit to a 40-hour program.
 3. The Judicial Experience Program will be open to all second and third-year law students at the two Maryland law schools.

V. NEW ADMITTEE COURSE ON PROFESSIONALISM

After reviewing the presentation, timing and substance of the Maryland Professionalism Course for New Bar Admittees, the Commission makes the following recommendations:

- A. The existing timeline for the Professionalism Course should be maintained, although the Commission recognizes that taking the course within one year of admittance to the Bar would allow new attorneys to bring some of their first-hand experience to the course, thus making the course more useful.
- B. The Maryland Professionalism Course should include mentoring initiatives, which could be viewed as the first step in mentoring new attorneys. The Maryland State Bar Association mentoring list should be made available at the course so that the new admittees would have a contact from the start.
- C. The Standards of Professionalism should be incorporated and explained as an integral part of the course.
- D. The course should be made more relevant to attendees by using “breakout” sessions so that material can be directed appropriately to each lawyer’s intended area of practice. Instructors at these sections should represent those specific areas of practice.
- E. To further engage attendees and encourage thought and recognition of the day’s discussions, a writing requirement should be added to round out the course activities. Possible topics include: “What will you do to promote professionalism?” or, “What action will you take in your daily practice to promote professionalism?”
- F. The video vignettes, if used, should be updated.
- G. More emphasis should be placed on the real concerns of legal malpractice and client complaints by including speakers from the Attorney Grievance Commission and representatives from legal liability insurance providers.
- H. The pervasive problem of discovery abuse warrants a discussion in the New Admittee Course. Participants should be encouraged to read *Discovery Problems and Their Solutions*, by the Hon. Paul W. Grimm with Paul Mark Sandler.

VI. COUNSELING FOR LAWYERS DEMONSTRATING REPEATED UNPROFESSIONAL BEHAVIOR

To address the problem posed by lawyers who repeatedly exhibit unprofessional behavior, the Commission recommends:

- A. The Court of Appeals should implement a program to provide counseling for experienced attorneys who exhibit unprofessional conduct. The program should include the following elements:

1. Local Bar associations throughout the State should form professionalism committees, comprised of experienced and well-respected local lawyers and judges who will receive complaints from the bench and Bar concerning unprofessional behavior by attorneys that do not rise to the level of a violation of the Rules of Professional Conduct.
 2. Each local Bar association should establish its own procedures for the processing of complaints. Complaints deemed serious should become the subject of counseling by a panel of attorneys and at least one judge from the professionalism committee.
- B. No lawyer should be required to participate in counseling, which should be educational and mentoring in nature. No record of counseling should be kept by attorney name, but a statistical record should be kept and submitted annually to the Professionalism Commission concerning the number of attorneys counseled, whether the counseling effected change on the part of the attorney, and other feedback.
- C. Members of the local Bar association professionalism committees should be highly regarded and experienced members of the Bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

VII. UNAUTHORIZED PRACTICE OF LAW

To address professionalism concerns arising from the unauthorized practice of law, the Commission recommends:

- A. No changes (additions or deletions) should be made to the current statutory definition of the practice of law.
- B. Mechanisms and procedures should be established by which the alleged unauthorized practice of law is monitored and, if found, prosecuted.
- C. The Professionalism Commission, if ongoing, should have an Unauthorized Practice of Law Committee to act as a clearinghouse for complaints concerning the unauthorized practice of law and to monitor the unauthorized practice of law.
- D. The Maryland State Bar Association and possibly local and specialty Bar associations should be encouraged to develop means to refer unauthorized practice of law complainants to the appropriate resource and possibly, if necessary, to fund any enforcement proceedings.
- E. The Maryland State Bar Association should maintain the committee on unauthorized practice of law, however named. The committee should be

patterned after the Association's Ethics Committee to provide a resource to lawyers and their clients who are seeking advice on whether specific practices constitute the unauthorized practice of law.

- F. The Attorney Grievance Commission and the Office of the Attorney General should coordinate efforts to review and cross-refer any complaints for the purpose of determining which of their offices are best suited to deal with a particular complaint.
- G. The Office of the Attorney General should, in the appropriate case(s), be asked to provide formal opinions on whether specific practices constitute the unauthorized practice of law.
- H. The Professionalism Commission should encourage the Attorney Grievance Commission and/or the Office of the Attorney General to pursue a test case or cases in areas of repeated concern.
- I. The Judiciary, the Bar and the public should be educated about the value of legal representation, the practice of law, and the problems arising from the unauthorized practice of law. Judges and lawyers should be made aware that victims of the unauthorized practice of law can be referred to the Attorney Grievance Commission or the Office of the Attorney General for investigation.
- J. The Attorney Grievance Commission and the Office of the Attorney General should report the nature of all investigated allegations of the unauthorized practice of law and any outcome to the Court of Appeals and the Maryland State Bar Association.

VIII. ROLE OF THE JUDGE WITH THE BAR AND IN THE COMMUNITY

In order to clarify and increase the participation of judges within the Bar and in the community, the Commission recommends:

- A. A Rule change or a comment to Maryland Rule 16-813 and Canon 4 making more explicit the intent of the Court and the Commission that judges be encouraged to engage in greater interaction among the bench, the Bar and the community.
- B. Additional training for judges regarding recusal rules, and updating of sitting judges on any recusal rule changes.
- C. Continued inclusion of professionalism in all judicial training sessions.
- D. A system by which to obtain advisory opinions from the Judicial Ethics Committee and a polling of the Judiciary on the adequacy of the present system.

- E. Judges be encouraged to write and provide for advance review of any proposed public speech by the Court Information Office.
- F. All judges receive a hard copy of each Judicial Ethics report.
- G. Investigative Counsel to the Maryland Judicial Disabilities Commission write a column in “Justice Matters.”

IX. CONTINUATION OF THE PROFESSIONALISM COMMISSION

The Commission recommends that the Professionalism Commission be continued with its mission defined in an Administrative Order of the Chief Judge fashioned after the draft Order provided, with funding derived from an annual assessment imposed on each attorney admitted to practice in Maryland.

**ADDENDUM TO THE REVISED FINAL REPORT RECOMMENDATIONS
STANDARDS OF PROFESSIONALISM
July 18, 2007**

Add Item 8 under **Civility and Courtesy**:

8. The Standards of Professionalism are to be observed in all manner of communication. A lawyer should resist the impulse to respond uncivilly to electronic communications in the same manner as he or she would resist such impulses in other forms of communication.

Add Number 21 to **B. Rules of Professionalism**:

21. A lawyer shall observe these Rules of Professionalism in all manner of communication, including being vigilant to recognize and resist impulses to respond uncivilly to electronic communications.

IN THE COURT OF APPEALS OF MARYLAND
ADMINISTRATIVE ORDER CONTINUING PROFESSIONALISM COMMISSION

WHEREAS, Throughout the 1990s, members of the Maryland Bench and Bar had become increasingly aware of issues and repercussions of unprofessional behavior by lawyers, which spurred adoption of civility codes and, since 1992, a mandatory course in professionalism for all new admittees to the Maryland Bar; and

WHEREAS, The Conference of Chief Justices in 1996 adopted a resolution which called for a study of lawyer professionalism and encouraged the appellate court of highest jurisdiction in each state to take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench and Bar by establishing a Commission on Professionalism; and

WHEREAS, By Order dated April 25, 2002, a Professionalism Task Force was established to study the concept of professionalism within the Maryland bench and Bar and to identify the qualities of, and a consensus as to, professionalism; and

WHEREAS, The Task Force completed its work and, among other proposals, recommended the establishment of a Professionalism Commission; and

WHEREAS, On November 10, 2003, the Court of Appeals adopted the recommendation to establish a Professionalism Commission which occurred on February 17, 2004; and

WHEREAS, The Professionalism Commission, over a two-year period, explored the recommendations of the Professionalism Task Force and on May 10, 2006 adopted its first report.

NOW, THEREFORE, I, Robert M. Bell, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Constitution, do hereby order this ___ day of _____, 2007, effective immediately:

1. Creation. The Court Commission on Professionalism shall continue for a period of _____ years.
2. Members.
 - a. Commission. The Commission shall consist of the following members:
 - i. The Chief Judge of the Court of Appeals or a designee of the Chief Judge, as the Chair;
 - ii. The Chief Judge of the Court of Special Appeals or a designee of the Chief Judge;
 - iii. The Chair of the Conference of Circuit Judges or a designee of the Chair;
 - iv. The Chief Judge of the District Court or a designee of the Chief Judge;
 - v. A judge from the United States District Court for Maryland, designated by that Court;

- vi. The Dean of each of the accredited law schools in Maryland or a designee of the Dean;
- vii. A lawyer representative from each Maryland County and Baltimore City, appointed by the Chief Judge of the Court of Appeals;
- viii. The president of the Maryland State Bar Association, Inc. or the president's designee;
- ix. A representative from the Attorney Grievance Commission, appointed by the Chief Judge of the Court of Appeals;
- x. A representative from the Standing Committee on Rules of Practice and Procedure, appointed by the Chief Judge of the Court of Appeals;
- xi. A representative from the Judicial Disabilities Commission, appointed by the Chief Judge of the Court of Appeals; and
- xii. A reporter, appointed by the Chief Judge of the Court of Appeals.

b. Advisors. To the extent provided in the Judiciary's budget or other source of funds, the Commission may invite others to provide advice to, or otherwise participate in, the Commission's work, through invitations to the public for, appointment to subcommittees or assignment of specific tasks such as statistical and academic research.

c. Compensation. The members and advisors are not entitled to compensation but, to the extent provided in the Judiciary's budget, may be reimbursed for expenses in connection with travel related to the work of the Commission.

3. Meetings.

a. Scheduling. The Commission shall meet at the call of the Chair.

b. Quorum. A majority of the authorized membership of the Commission shall constitute a quorum for the transaction of business.

4. Forums.

a. Purposes. The primary tasks of the Commission are to explore, as well as monitor, the implementation of the professionalism policies adopted by the Court of Appeals, examine ways to promote professionalism among Maryland lawyers, and provide sustained attention and assistance to the task of ensuring that the practice of law remains a high calling that is focused on serving clients and promoting the public good.

b. Mission. The mission of the Commission is to support and encourage members of the Judiciary to exhibit the highest levels of professionalism and to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public to fulfill their obligations to improve the law and the legal system and to ensure access to that system.

c. Duties. To carry out its purposes, the Commission shall:

- i. Plan, implement, monitor and coordinate professionalism efforts in the Bar, courts, law schools and law firms;
- ii. Continue to develop mechanisms to advance professionalism as an important core value of the legal profession and the legal process;
- iii. Gather and maintain information to serve as a resource on professionalism for lawyers, judges, court personnel and members of the public;
- iv. Serve as a catalyst for positive change;
- v. Cultivate the professional community of the Bar;
- vi. Consider efforts by lawyers and judges to improve the administration of justice;
- vii. Monitor professionalism efforts in jurisdictions outside Maryland;
- viii. Promote and sponsor state and local activities that emphasize and enhance professionalism to include a yearly Convocation on Professionalism and promote regional and county convocations on professionalism;
- ix. Make recommendations to the Court of Appeals, the Maryland State Bar Association, and local and specialty Bars concerning additional means by which professionalism can be enhanced;
- x. Receive and administer gifts and grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities;
- xi. Monitor the efforts of the Maryland State Bar Association and other associations and committees in carrying out the mandate of this Court with respect to advancement of professionalism and submit periodic reports to this Court on those efforts.

5. Staff. The Commission shall have the staff assistance assigned by the Chief Judge of the Court of Appeals.

6. Source of Funding. The Commission shall be funded by an annual assessment imposed upon every attorney admitted to practice in Maryland.

7. Authority. The Commission on Professionalism has no authority to receive complaints within the province of the Attorney General's Office, the Attorney Grievance Commission or the Commission on Judicial Disabilities and shall refer any such complaints received to the appropriate Commission.

8. Rescission of Prior Order. The Order dated February 27, 2004 is rescinded.

Robert M. Bell
Chief Judge
Court of Appeals of Maryland

Filed:

Clerk
Court of Appeals of Maryland

SUMMARY OF COMMENTS FROM THE COUNTIES, BY SUBCOMMITTEE SUBJECT AREA

Standards of Professional Conduct, Including Identifying Indicia of Professionalism

A participant observed that there is a higher degree of professionalism and civility in rural areas, and expressed concern that too high a degree of civility may compromise the interest of the client. This participant further observed that clients sometimes believe lawyers have more loyalty to each other than to their clients. Judge Battaglia observed that advocacy and loyalty to one's client do not equate to a lack of civility, and that civility does not equate to a compromise of the client's interests. Judge Bell observed that there is an assumption that the lawyer is competent, that civility and professionalism are superimposed on that assumption, and that it is not expected that the client's interests will be sacrificed. (Allegany)

A participant expressed concern regarding the proposed link between violations of the standards of professionalism and the Maryland Lawyers Rules of Professional Conduct. (Allegany) (also placed under Sanctions breakout).

One area of unprofessional behavior has to do with the economics of law. Scheduling conferences and other ministerial tasks offer the opportunity to bill hours. This is part of the larger problem of churning cases for hourly billings. An example is found in the Court of Appeals opinion in *Piper Rudnick LLP v. Hartz*, 386 Md. 201 (2005), where one law firm charged \$1 Million in a case having to do with the attempted removal of a personal representative. (Anne Arundel)

The Standards of Professionalism should include the duty to give clients a realistic estimate of prospective legal fees as well as a realistic prediction of the likely result, in order that a client can make a cost/benefit decision before the fees are out of hand. Judges should also look at the history of settlement negotiations before awarding attorney's fees in domestic matters. (Anne Arundel)

The Commission's recommendations should include mandatory fee arbitration. (Anne Arundel)

An important comment and recommendation was that the Commission view the proposed Standards of Professionalism as a "work in progress." In the opinion of one participant, the Standards, as presently drafted, are incomplete and disorganized. Specifically, the Standards must focus on core values such as competence, integrity and civility as important to the advancement of the rule of law. The Baltimore City Guidelines on Civility (appended to these minutes) were recommended to the Commission as a better exposition of professionalism. (Baltimore City)

It was also suggested that the Commission revisit the MSBA professionalism guidelines in place of the now proposed Standards of Professionalism. (Baltimore City)

Several participants expressed the concern that the Commission's recommendations with regard to sanctions will cause the aspirational standards to become hard and fast rules. Also, the Standards of Professionalism are not clear as to their mandatory or aspirational content. For example, does "should" (as used in the Standards) mean "shall"? (Baltimore County) (also placed under Sanctions)

Will the Standards of Professionalism be reworked to avoid prosecution of trivial matters? (Baltimore County)

The Standards of Professionalism require a lawyer to "cooperate and compromise" – is this in conflict with the duty to zealously represent our clients? (Baltimore County)

Litigation is too expensive. Large firms churn cases to generate fees, prejudicing litigants with fewer resources. (Baltimore County)

Other participants pointed out the difference between large, urban jurisdictions and smaller counties, where uncivil and rude lawyers immediately develop an unfavorable reputation. Another problem in smaller counties is that clients sometimes interpret the collegial atmosphere as a failure of lawyers to act sufficiently adversarial to one another. As a result, clients often hire out of county lawyers who, they feel, will be more aggressive. This implicates the larger question of whether unprofessional behavior is, in part, client-driven and raises the question of how we, as lawyers, can educate the public away from this perception. (Calvert/St. Mary's)

Several participants mentioned the public's poor perception of lawyers and asked if some public relations type program would help. In this regard, there were also questions concerning the possibility that some degree of unprofessional conduct on the part of lawyers may be the product of a client's desire that lawyers be unpleasant to the representative of a hated adversary. (Carroll)

An attendee commented that they believed unprofessional behavior was less of a problem in smaller jurisdictions because attorneys were more familiar with one another. Professionalism Committee member, Danny R. Seidman, responded that the same point was made by members of the Professional Committee at Committee meetings. (Charles)

One member of the Bar noted that if civility and the settling of litigation are related, such concepts may be inhibited by a local rule that exists (not in Dorchester County) that imposes substantial fines on attorneys involved in cases that settle within ten days of trial. (Dorchester)

Finally, one Bar member commented on the behavior of some members of internet "listservs", where attorneys can pose practical questions to other attorneys and engage in discussions. Some

of those members apparently take pleasure in engaging in hostile and demeaning conduct toward others in a somewhat public way. The member noted that perhaps this type of conduct would be considered to be of the more egregious nature as discussed earlier. (Dorchester) (also placed under Sanctions)

Professionalism Guidelines and Sanctions for Use By Judges

A participant questioned the operation of proposed Rule 1-342, specifically as it pertains to the references to a “*monetary award*.” (Allegany)

A participant expressed concern regarding the proposed link between violations of the standards of professionalism and the Maryland Lawyers Rules of Professional Conduct. (also placed under Standards breakout) (Allegany)

With regard to the proposed changes to Judicial Canon 3 – will judicial referrals be anonymous? Will there be sanctions for judges who do not report? What is a “repeated and egregious” violation? How will we know? (Anne Arundel)

The Court of Appeals has made it nearly impossible to successfully hold an attorney in contempt, even in the most egregious cases. The proposed new sanctions will fall victim to the same jurisprudence. The problems with enforcement that have plagued Rule 1-341 are likely also to render proposed new rule 1-342 impotent without some change. A model might be the federal system, which has a zero tolerance for unprofessional behavior. (Anne Arundel)

Several participants questioned the Commission’s recommendations regarding sanctions for unprofessional behavior. Specifically participants wanted to know if the proposed Standards of Professionalism will be mandatory and, if so, whether motions for sanctions under proposed new Rule 1-342 will be an opportunity for abuse. In addition, the group was concerned with the due process implications accompanying the administration of sanctions. (Baltimore City)

On the one hand, it was pointed out, the Commission has recommended counseling for errant lawyers; but at the same time the report recommends sanctions. This is confusing. (also placed under Errant Attorney breakout) (Baltimore City)

Because the trigger for sanctions is the “repeated or egregious” violation of the Standards of Professionalism, one participant expressed concern that an attorney demonstrating repeated behavior but in different jurisdictions would possibly escape notice and referral to counseling. (Baltimore City)

A number of comments were made concerning difficulty judges have imposing sanctions under existing rules and whether this will become easier under the proposed new rules 1-342 and Canon 3. In addition, proposed new Rule of Professional Responsibility 8.4(h) may become just an “add on” in every AGC complaint. (Baltimore City)

Several participants expressed the concern that the commission’s recommendations with regard to sanctions will cause the aspirational standards to become hard and fast rules. (also placed under Standards breakout) (Baltimore County)

Does proposed new rule 8.4(h) overlap existing 8.4, which prohibits behavior prejudicial to the administration of justice? (Baltimore County)

Proposed new Rule 8.4(h) and 1-342 put too much power in the hands of judges who may abuse it. (Baltimore County)

We should look at the federal example - zero tolerance for unprofessional behavior. (Baltimore County)

The terms “egregious” and “repeated” need to be clarified. (Baltimore County)

A Bar Member then commented that compared to other areas and states, he has found that Cecil County professionalism is very high and sanctions are not necessarily needed.

- Judge Battaglia responded that the issue of sanctions depends on enforcement at the Bar level and that they could explore expansion of sanctions at a later time. (Cecil County)

A Bar Member stated that sanctions for errant attorneys should be made stiffer and use the fines to fund the Commission instead of all attorneys bearing the cost. (also placed under “Funding of the Commission”)

- Judge Battaglia responded by stating that such funds are in the general fund and cannot be specified at this time
- Judge Battaglia further stated that all these issues must be worked out and that they are not mandating specific ways to address the issues, as the culture is different in all counties (Cecil County)

A Bar member replied that the issues also include errant Judges.

- Judge Battaglia replied that errant Judges will be addressed and that issues about judicial disabilities have been raised. (Cecil County)

A Bar member commented regarding the Committee’s finding on Discovery problems and that Judges are reluctant to impose sanctions on attorneys

- Judge Battaglia responded that it may be because a Judge wants to ensure that the client is not penalized.
- Bar Members then commented that often it is not the attorney’s fault; rather the clients fail to respond to requests or are slow to produce the discovery.
- Judge Battaglia responded that there must be due process in all of this.

(Cecil County) (This comment has also been placed under the Discovery Abuse breakout)

A different Bar member stated that he understood the need to put teeth into sanctions and wondered if “egregious” and “repeated” would be more defined or expounded upon.

- Judge Battaglia stated that these findings must go before the Rules Committee or must go to the appropriate Committee.
- Judge Battaglia also stated that the Attorney Grievance Commission must have a role in the process.

- Judge Battaglia agreed that misconduct must be defined.
(Cecil County)

An attendee commented that most incidents of unprofessional behavior are observed by other lawyers, not judge, and other lawyers are unlikely to report unprofessional behavior. Judge Battaglia responded that Rule 8.3 of the Maryland Rules of Professional Conduct already provides that lawyers have an ethical obligation to report violations. Judge Battaglia also commented that a similar issue was raised by a transactional attorney at another Town Hall meeting. (Charles)

An attendee commented that Rule 8.3 is only triggered in a situation where a lawyer has knowledge that another lawyer had violated rules, and that judges did not have the same reporting requirement under Rule 8.3. (Charles)

An attendee suggested that the reason that the rule only applied to a lawyer's observation is because judges rarely see the same behavior that the lawyer sees since lawyers generally behave better when they are before a judge. Judge Battaglia commented that Rule 8.3 could potentially be abused by attorneys. (Charles)

An attendee commented that he couldn't imagine that "all this" was necessary regarding the need for a Professionalism Commission, and that he couldn't see the need to have Mel Hirschman intruding any further into our personal and/or professional lives. (Charles)

An attendee voiced concern that they couldn't see expanding the Court's jurisdiction into another area, and that they didn't believe that it was the role of judges to report attorneys for unprofessional conduct to anyone other than Bar Counsel. The attendee said that if they were inclined to report inappropriate behavior to anyone it would be the Attorney Grievance Commission. (Charles)

An attendee commented that they didn't believe unprofessional behavior was as much of a problem for judges because the offending party could be pulled aside by the judge and reprimanded, and that would be sufficient to curb any inappropriate behavior. (Charles)

Procedural issues were raised as well. One member questioned whether the Rules of Evidence would apply at any proceedings that may result from the work of the Commission. The question of whether confidentiality would exist for those reporting unprofessional conduct was also raised. Judge Battaglia noted that more informal mechanisms may be more effective in small areas. (Dorchester)

Finally, one Bar member commented on the behavior of some members of internet "listservs," where attorneys can pose practical questions to other attorneys and engage in discussions. Some of those members apparently take pleasure in engaging in hostile and demeaning conduct toward others in a somewhat public way. The member noted that perhaps this type of conduct would be considered to be of the more egregious nature as discussed earlier. (Dorchester) (also placed under Standards)

One participant commented that Masters should be empowered to impose sanctions, since lawyers, realizing the Master's limited authority, often misbehave in that forum. A judge pointed out that regardless of the potential sanction, judges must know of the wrongful behavior. Motions for sanctions must describe explicitly what happened and the surrounding events. (Frederick County)

A participant suggested that proposed new Rule 1-342 be strengthened to function like Federal Rule 11. (Frederick County)

A participant was concerned that proposed new Judicial Canon 3 seems to take discretion from a judge, stating instead that a judge *shall* report repeated or egregious conduct to the Attorney Grievance Commission. (Frederick County)

One judge pointed out that in a child custody case, it is difficult to impose sanctions of any sort, since the purpose of the case is to effect the child's best interests. (Frederick County)

One participant commented that lawyers do not want sanctions for discovery violations – most lawyers just want the documents. Perhaps mandatory production as in the Federal Rules is an option. (Frederick County) (this comment has also been placed under the Discovery Abuse breakout)

Proposed change to Judicial Canon 3, which states that judges “shall” report repeated or egregious violations of the Standards of Professionalism, is problematic. Will judges be sanctioned for failure to report? (Garrett)

Judges may use the proposed new rules to harass lawyers. (Garrett)

Clearly noted was the fact that repeated and/or egregious conduct was sanctionable. (Harford)

One of the first areas of discussion involved the Commission's recommendations concerning sanctions for unprofessional behavior among attorneys, namely proposed new Rule 1-342, new Rule of Professional Conduct 8.4 (h) and additions to Judicial Canon 3. Several participants felt that these provisions might simply escalate disputes, spawning complaints and cross-complaints in every case. There was some feeling that there should be a way to address these issues short of a resort to sanctions. This possibility was later addressed in the presentation of the Commission's proposal of counseling for errant attorneys. (Howard)

Attorney misconduct is often caused by judicial misconduct, specifically the failure of judges to enforce the rules fairly and impartially. (MD Law School) (also placed under Errant Attorney)
Can judges be sanctioned for failing to report those who may have violated the Standards? (Montgomery)

Will the new sanctions empower judges to harass lawyers? (Montgomery)

What quantum of evidence to sustain sanctions? Preponderance? Clear and convincing? (Montgomery)

The sanctions recommendations as now written do not adequately address due process issues for those accused. (Montgomery)
Existing law is sufficient for sanctions. (Montgomery)

Proposed new Rule 1-342 and Rule 8.4 (h) may have a chilling effect on zealous advocacy. There should be graduated sanctions. (Prince George's)

If, under the proposed changes to Judicial Canon 3, a judge does not report "repeated and egregious" violations of the Code of Professional Responsibility to the Attorney Grievance Commission, can that Judge be sanctioned for failing to report? (Prince George's)

Proposed new Rule 8.4 (e) could be a comment. (Prince George's)

Participants asked for clarification of the relationship between Rule 1-341 and proposed new Rule 1-342. In addition, a judge suggested that the Report make clear that proposed Rule 1-342 does not effect the doctrine of contempt – that the two are separate. (Queen Anne's/Kent)

The recommendation that "repeated and egregious" conduct be sanctioned drew questions such as how any unprofessional conduct cannot be "egregious." Sanctions, some worried, will become a sword rather than a shield, with unprofessional lawyers filing 1-342 motions with the same frequency as federal Rule 11 motions. (Queen Anne's/Kent)

Several participants were concerned about the due process rights to be afforded any lawyer sanctioned under proposed new Rule 1-342. This, Judge Battaglia explained, will be fleshed out before the Rules Committee, if it acts upon the recommendation. (Queen Anne's/Kent)

In discovery disputes, the Master should assess costs to a misbehaving party. (Talbot/Caroline) (also placed under Discovery Abuse breakout)

Several participants reacted to the proposed Rule 1-342 (h):

- One attorney's visceral reaction was that this would be an "eyes on" review by a judge, not a report to a judge. If behavior is outside of the courtroom, the duty falls to other lawyers to report (i.e., unprofessional behavior by transactional attorneys.)
- Rule 1-342(h) will be a controversial rule. There is a distinction between aspirational guidelines and codification; codification may be a problem. Gradations in definition of abuse can be a tough issue for enforcement. How do you balance the codification of abuses against the rights of attorneys?
- The proposed rule departs from mediation effort that is being encouraged by the Attorney Grievance Commission.
- The gradation of response is subjective rather than objective. This concerns one participant who worried about how sanctions will be applied

(Washington County)

A judge commented that he was happy to see the proposed addition to Judicial Canon 3, especially the directive “shall”. (Washington)

The monetary awards are modeled on Rule 11. (Washington)

Has the Commission thought about how a complaint of unprofessional behavior will be initiated? What standards will be employed? For example, with discovery disputes, there are more critical ramifications to the delay in criminal cases than in civil cases. (Washington) (also placed under Errant Attorney breakout)

Several participants were concerned about what due process rights would be afforded any lawyer sanctioned under proposed new Rule 1-342. This, Judge Battaglia explained, will be fleshed out before the Rules Committee, if it is asked to act upon the recommendation by the Court. (Wicomico/Somerset)

Several attendees asked how judges will decide what behavior is unprofessional enough to warrant sanctions. Judge Battaglia explained that the inclusion of the terms “repeated or egregious” is a first step in defining actionable conduct from isolated incidents. (Wicomico/Somerset)

Does proposed new Rule 1-342 preempt contempt? (Worcester)

What due process protections will accompany the proposed sanctions? Is there an inherent conflict between the proposed new rules and the existing Rule of Professional Conduct requiring zealous representation of clients? (Worcester)

There is a concern that monetary sanctions may be passed on to and be borne by the client, a potential injustice. (Worcester)

Several participants worried that the proposed new rules and sanctions will create another level of discipline, in addition to the Attorney Grievance Commission. (Worcester)

Discovery Abuse Issues, Including The Use of Discovery Masters

A participant questioned the source of funding for discovery masters. Judge Bell explained that these specifics have not yet been worked out. (Allegany)

The main problem in the discovery abuse area is delay. Why not more decisions without a hearing? (Baltimore County)

In discovery matters, judges must have the power to fashion flexible remedies with all deliberate speed in order to cut the cost of litigation by these disputes. (Baltimore County)

Discovery abuse, identified by the Commission as a significant problem, is also ill-defined. (Calvert/St. Mary's)

A Bar member commented regarding the Committee's finding on Discovery problems and that judges are reluctant to impose sanctions on attorneys.

- Judge Battaglia responded that it may be because a judge wants to ensure that the client is not penalized.
- Bar members then commented that often it is not the attorney's fault; rather the clients fail to respond to requests or are slow to produce the discovery.
- Judge Battaglia responded that there must be due process in all of this.

(Cecil)

A Bar Member questioned the problems between deadlines and the court calendar, specifically that there is friction between the judges and attorneys because even if both sides agree, the judges still deny postponement.

- Judge Battaglia responded that this issue has been previously raised.

(Cecil)

A Bar member further commented on Discovery Issues and that an attorney should document if it was the client's fault and not the attorney's fault. (Cecil)

One participant commented that lawyers do not want sanctions for discovery violations. Most lawyers just want the documents. Perhaps mandatory production as in the Federal Rules is an option. (Frederick) (also listed in Sanctions breakout)

Discovery abuse may be the result of ignorance rather than misbehavior. Mentoring is important in the progress of new lawyers who learn the process. (Garrett) (also placed under Mentoring)

The problem of discovery abuse could be addressed, in part, by the use of certain types of discovery tailored to the specific needs of certain cases, such as domestic relations actions. (Garrett)

It is anticipated that Discovery disputes will be dealt with by Discovery judges in larger counties and Discovery Masters in smaller counties. (Harford)

There was general consensus that the greater use of discovery masters would be of great help in easing tensions, particularly in the domestic law area. (Howard)

Many lawyers embroiled in discovery disputes cite the discovery opinions that the Commission has recommended be made public. (Montgomery)

The Discovery Abuse Subcommittee should focus on ways to effect immediate resolution of disputes – the main problem. (Prince George's)

Recommendations with regard to discovery abuse seemed to be a “one size fits all” solution that is less necessary in small counties. (Queen Anne's/Kent)

Discovery solutions in different counties may lead to inconsistent results state-wide. (Queen Anne's/Kent)

In discovery disputes, the Master should assess costs to a misbehaving party. (Talbot/Caroline) (also placed under Sanctions breakout)

District court judges do not have the time to sift through discovery disputes and motions. These should be diverted to another tribunal or decision maker to keep the district court docket moving. (Talbot/Caroline)

Mentoring

The Commission was urged to avoid placing the burden of any mentoring program on the Young Lawyers Subcommittee of the Bar, a group that is already overburdened. (Baltimore City)

Mentoring should be not only for new admittees but also for experienced attorneys who might profit from advice when moving into different areas of practice. (Carroll)

Discovery abuse may be the result of ignorance rather than misbehavior. Mentoring is important in the progress of new lawyers who learn the process. (Garrett) (also placed under discovery abuse)

A better system of mentoring, certification of skills, or a barrister system would go a long way toward addressing the problem. (Montgomery)

Large firms generally have a more professional practice, because there is more opportunity for mentoring. (Montgomery)

We can learn from the medical profession – need internships and more mentoring. (Montgomery)

The responsibility for mentoring young lawyers along the path to professionalism should be with partners in large firms, who otherwise pressure associates simply to bill hours. (Worcester)

Update Existing Professionalism Course for New Attendees

It was suggested that, if new admittees were allowed to take the professionalism course after a period of practice, the course requirement could be enforced by denying those who failed to take the course the ability to register for the client protection fund. (Carroll)

A Bar member asked Judge Battaglia whether a course on Professionalism is going to be a requirement.

- Judge Battaglia responded not at the present time; however, that option is still on the table and that the Task Force did not recommend the course.
- Further, such a course is not a precursor to CLE requirements.

(Cecil)

As a follow-up question, a Bar Member asked whether such a course would be for all Bar Members of the Bar or just for new Members.

- Judge Battaglia responded that the course is still on the table and has not been recommended by the Task Force to be mandatory for all attorneys.
- Judge Battaglia further commented that the course could be mandatory for all attorneys or could be tailored for errant attorneys

(Cecil)

A Bar member asked Judge Battaglia if the Professionalism course could be used for pro bono hours. (Cecil)

A Bar member then stated that the Maryland Professionalism requirements are relatively simple compared to Pennsylvania and that it is not an overwhelming request to take a Professionalism course. (Cecil)

An attendee asked whether or not there was any empirical data to support the claim that there were fewer problems of unprofessional behavior with newer attorneys than with more experienced attorneys, and the relationship of continuing legal education classes (CLE) to any such data. Judge Battaglia responded that she has received comments that Pennsylvania, which requires CLE, has fewer problems compared to Maryland, but that there was no empirical data available. (Charles)

Someone asked what attorneys seemed to want from proposed enhancements that are designed to improve professionalism. Judge Battaglia noted that requiring continuing legal education had been a disfavored concept, and that a required professionalism course was disfavored as well, partially because of the impact on solo and small firm practitioners. (Dorchester)

One Bar member questioned whether “Professionalism” can really be taught, and was concerned that this work may lead to more formal referrals to the Attorney Grievance Commission. Perhaps anything that results in a formal Attorney Grievance Commission referral should be

conduct of a more egregious nature, and that the persons involved in such conduct, whether it be of an egregious nature or not, will probably find themselves before the Attorney Grievance Commission anyway. (Dorchester)

An attendee noted that law school is very competitive and does not train one to be collegial and/or professional. Another noted that Law School does a poor job of distinguishing between the roles of the lawyer-advocate and the lawyer-counselor. (Harford)

One participant suggested that the professionalism course for new admittees might be given after several years of practice, rather than right away. Judge Battaglia explained the Commission's consideration and ultimate rejection of that proposal. (Howard)

We might want to consider certification of lawyers as competent and experienced in different areas. (MD Law School)

Mandatory CLE would be helpful. (Montgomery)

Mandatory CLE would be a simpler and more effective way to deal with the problem of unprofessional behavior at the Bar. (Prince George's)

Professionalism could be improved by requiring lawyers to be certified as practitioners in specific areas of the law. Problems can arise because lawyers practice in areas where they do not have sufficient knowledge or comfort. (Prince George's)

Out of State lawyers who pass the MD Bar and intend to practice here should take the professionalism course along with new admittees. (Prince George's)

The Court should consider a voluntary professionalism course for experienced lawyers. (Queen Anne's/Kent)

A participant wondered what percentage of current attorneys practicing in Maryland have taken the Professionalism Course since it was instituted in 1992. [Chief Judge Bell estimated that about 2/3 of approximately 30,000 current attorneys have taken the course.]

Developing a Course for Lawyers Who Exhibit Unprofessional Behavior

One participant questioned how local jurisdictions will receive funding for the training of those persons who ultimately will be appointed to counsel errant attorneys. (Allegany)

Complaints and referrals to counseling should be tracked from county to county so that judges will know what behavior is “repeated.” (Anne Arundel)

On the other hand, it was pointed out, the Commission has recommended counseling for errant lawyers; but at the same time the Report recommends sanctions. This is confusing. (Baltimore City) (also placed under Sanctions breakout)

The first question was how to define “bad lawyers.” Several participants felt that this is a subjective issue which might lead to an abuse of power. This problem is inherent in defining unprofessional behavior in an adversarial arena. Obviously there must be breathing room for speech in this regard. (Calvert/St. Mary’s).

The long term solution, said one participant, is to deal with less obvious and less egregious behavior before it gets out of hand. In this regard, several participants endorsed the Commission’s recommendation of counseling. Counseling will be difficult, however, in smaller counties. One idea was to institute a lawyer alter-ego program similar to that already in place for judges. (Calvert/St. Mary’s)

A Bar Member questioned whether before a formal filing, an attorney can go to counseling before being reprimanded. (Cecil)

It was further noted that the “process” contemplated referral to a local Bar group for voluntary counseling. Continued unprofessional conduct would move up the disciplinary chain. One participant noted that when you hear “That’s just (fill in the name)”! you know that person is professionally challenged and, further, that most people in the Bar know who those persons are. (Harford)

Some participants questioned one of the basic premises for the Report: whether the behavior of habitual unprofessional lawyers can be changed. First, some observed, we must find the reasons for bad behavior. Has the nature of the profession changed its members, resulting in bad behavior? To address this, one participant suggested, in a seminar context, a demonstration of bad behavior in a way that might embarrass those who recognize themselves. Public education is also very important. Prospective clients should be educated to seek good lawyers who will present the client’s case in the best way possible, but who will not escalate disputes unnecessarily. In other words, uncivil behavior should not be client driven. (Howard)

Data from local Bar counseling should be kept to identify repeat offenders. (MD Law School)

Attorney misconduct is often caused by judicial misconduct, specifically the failure of judges to enforce the rules fairly and impartially. (MD Law School) (also placed under Sanctions)

The alter ego program – now disbanded – was useful. Something should replace it. (Montgomery)

Misbehaving lawyers could be required to allow videotaping of their conversations and presentations. (Montgomery)

The Commission's recommendations with regard to lawyer-counseling were questioned because of the Commission's recommendation that the results not be made public. There was some concern that "bad apples" should not be hidden. There was also the suggestion that counseling be mandatory. Records should be kept, one participant suggested, and made public after several occurrences. There was also the worry that local Bar associations – particularly in small counties – may have trouble counseling their own. (Queen Anne's/Kent)

Has the Commission thought about how a complaint of unprofessional behavior will be initiated? What standards will be employed? For example, with discovery disputes, there are more critical ramifications to the delay in criminal cases than in civil cases. (Washington) (also placed under Discovery Abuse)

A related question concerned the potential problem with the Commission's proposed counseling program in the smaller counties, where a lawyer being counseled might be uncomfortable with close associates. Judge Bell pointed out that years ago, the local Bar associations once were charged with the responsibility of prosecuting violations of the Rules of Professional Conduct. The Attorney Grievance Commission was instituted primarily because of the perception that local Bar associations were too lenient with their members. These counseling sessions should be non-confrontational and collegial. (Wicomico/Somerset)

Defining the Unauthorized Practice of Law

A participant questioned how the unauthorized practice of law would be enforced if a person or entity is engaged in the unauthorized practice of law, but the consumer has not been harmed or has not complained. It was explained that enforcement of UPL is complaint driven, and that enforcement needs to be carried out by or on behalf of the consumer so as to avoid accusations of turf protections and also to avoid restraint of trade issues. The rule prohibiting persons not admitted to the bar from practicing law was cited as the fundamental basis for enforcement. (Allegany)

One problem area highlighted was that the Commission's recommendations regarding the unauthorized practice of law are inconsistent with the treatment of pro se litigants. (Anne Arundel)

Who can be a complainant for suspected unauthorized practice of law? (Baltimore County)

Pro se litigants in the family law arena is an area that must be addressed (Baltimore County)

Several questions were asked about the unauthorized practice of law, namely, if enforcement should be geared toward protection of the profession as well as protection of the public. Mike Preston, who served on the Commission's Subcommittee on UPL, explained that enforcement cannot be construed as a restraint of trade, and for that and other reasons, enforcement must be designed for the purpose of protecting the public. (Carroll)

There were additional questions regarding the role of the Commission in pursuing the UPL test cases mentioned in the Report. Mike Preston explained that the complainant in such cases can be the local Bar or the MSBA. Bar Counsel will accept such complaints. (Carroll)

On the question of the unauthorized practice of law, some wondered what procedures may be in place to address such claims. (Dorchester)

Several attendees remarked that attorneys lodge few complaints about the unauthorized practice of law because of the perception that such complaints are pointless and go nowhere. (Frederick)

Professionalism includes *pro bono* work. This will also help limit the number of *pro se* litigants. In this respect, there was discussion recent "Civil Gideon" decision of the Court of Appeals. (Frederick)

Pro se litigants add to the problem, since they are not constrained as lawyers are. (Montgomery)

Did the Commission discuss pro se litigants? [Chief Judge Bell reported that Judge Green is heading up a group studying policy toward pro se litigants and how judges deal with them.] (Washington)

Judges' Role in the Bar and With Communities

Mandatory judicial evaluations should be instituted in every jurisdiction. Problems such as the possibility the evaluations will be used against incumbents in an election can be overcome. The alter ego program is not working. Another idea would be for the Bar Association to appoint a panel of lawyers to accept complaints about judges. (Anne Arundel)

One attendee commented that judges may act rude and unprofessional and questioned the applicability of the Commission's recommendations to the judiciary. (Baltimore City)

All agreed with the Commission's observation that the greater the participation by the bench in Bar activities, the higher the degree of professionalism. Judges, many thought, are less accessible now than in previous times. Some courthouses encourage judges to be cordoned off from the public. Judge Bell pointed out that this is entirely a local decision. (Calvert/St. Mary's)

One participant noted that the Report fails to take Administrative Law Judges into account as participants in the legal process. The participant explained that often ALJs do not adhere to the same standards of decorum and professionalism as do circuit and district court judges. (Carroll)

A Bar member replied that the issues also include errant Judges.

- Judge Battaglia replied that errant Judges will be addressed and that issues about judicial disabilities have been raised. (Cecil)

Commenting on the notion that judges should be more involved in the community, one member noted that historically judges had been more aloof, and that such aloofness helped insulate judges from claims of bias or prejudice. Judge Battaglia responded that such distance is a somewhat recent phenomenon, and that there exists now a belief that bringing judges into more active roles in the community helps raise the level of respect for the legal profession. (Dorchester)

The participation of judges in community organizations, particularly charitable organizations which are involved in fund raising activities, puts judges' involvement in potential conflict with judicial canons. (Garrett)

Judicial ethics rulings have kept judges from community participation. The Professionalism Commission's recommendations will help. (Montgomery)

In smaller counties, the Commission's recommendation for a larger judge's role increases the chances for recusal. (Talbot/Caroline).

The Standards do not sufficiently address the leadership role of the judiciary. The judge sets the tone of dignity and civility in his or her courtroom – the most important role. Accordingly, the Standards should also impose specific standards upon the judiciary. One attendee forwarded additional materials which are attached to these minutes. (Talbot/Caroline)

Perhaps in larger jurisdictions there is a lack of communication between the Bar and the judges that is a contributing factor in the lack of professionalism. (Washington)

Several judicial participants questioned the need for submission of speeches to the court information office. Judge Battaglia clarified this by explaining that the Commission does not propose that submission be mandatory. It is simply a resource for any judge who might want to have someone look at a proposed speech before it is given. (Worcester)

Several judges discussed the issue of a judge's participation in community organizations, particularly political organizations and charitable groups who solicit contributions from the Bar or from the public. Judges should be more involved, and a change in the Canons is welcome to clarify what is allowed. (Worcester)

Monetary Assessments/ Continuation of the Professionalism Commission

Several participants asked what sort of assessment would be considered to fund the proposed continuation of the Commission, and what resources would be needed. Judge Battaglia explained that the Commission would need office space, an Executive Director and a budget. Its ongoing work would be to spearhead efforts regarding the Commission's recommendations, with the Rules Committee and others, and to act as a clearinghouse for professionalism concerns. Many states already have full time staff for their professionalism commission. (Carroll)

The suggestion was made that fines levied under proposed new Rule 1-342 be used to fund the Professionalism Commission's work. (Carroll)

In light of the Commission's recommendation of a greater role for the MSBA in professionalism matters, several participants asked if the MSBA will become a mandatory Bar association. Judge Battaglia explained that the Commission has not considered this, because it is a matter beyond its charge. (Carroll)

A Bar member stated that sanctions for errant attorneys should be made stiffer and have the sanction funds used to fund the Commission instead of all attorneys bearing the cost.

- Judge Battaglia responded by stating that such funds are in the general fund and cannot be specified at this time.
- Judge Battaglia further stated that all these issues must be worked out and that they are not mandating specific ways to address the issues, as the culture is different in all counties. (Cecil) (also listed under sanctions breakout)

A Bar member asked about the potential assessment fee and suggested placing a cap on the amount of the assessment.

- Judge Battaglia responded that Maryland ranks as one of the states that requires the least amount for attorneys to pay in assessments; such an assessment may be added to the existing assessment, probably for approximately an additional \$5.00. (Cecil)

An additional bar member followed up and asked if the court calendar and issues regarding postponement was established by the Court of Appeals. (Cecil)

A Bar member stated that the assessment sounds minor; could it be linked to the attorney trust fund?

- Judge Battaglia responded yes, and they want to limit the amount of assessment mailings to attorneys and just have one assessment a year.

(Cecil)

One participant suggested that the proposed annual assessment for lawyers be higher for urban lawyers than for rural lawyers. (Washington)

Miscellaneous

Several participants questioned the Commission's failure to address the issue of court security in light of recent acts of violence. What responsibility do lawyers have for their clients, when violent behavior can be anticipated? Do lawyers have a right to be outraged when required to pass through metal detectors; or to turn off cell phones in court? (Baltimore City)

Participants also opined that the Commission should take on the issue of "local rules." Although such are not allowed, they persist and are used against "non-locals." (Baltimore City)

One participant opined that he had not experienced unprofessional behavior over many years of practice. (Baltimore County)

The Report has a litigation bias. It needs more attention to the transactional side of the practice. (Baltimore County)

Law may be a calling, said one participant, but failure to pay attention to the business end of the profession is what gets many lawyers in trouble. (Frederick)

Finally there was a comment that an attorney's appearance should be stricken as a matter of course when a jury trial is prayed in District Court. Chief Judge Bell noted that this comment would be passed on to the Rules Committee. (Harford)

Several participants expressed the concern that the Commission's recommendations do not adequately take transactional practice into consideration. (MD Law School)

The quality and temperament of trial judges varies throughout the State, as do local procedures. Lawyers should have some fair notice of what is expected in different jurisdictions. (MD Law School)

One-half of all civil disputes are filed in domestic causes, which validates the Commission's focus on domestic law as one of the most litigious areas. It may be worthwhile to consider separate guidelines in this area. (MD Law School)

The Commission should specifically address problems with e-filing and e-discovery. (MD Law School)

The Commission's report seems to focus almost entirely on litigation, while many problems exist in the transactional arena. (Prince George's)

The public should be educated about the legal process – what we do and how we do it. (Talbot/Caroline)

One attorney commented that perhaps much of the perceived lack of professionalism can be driven by lawyers who are less than successful economically. Attorneys need to know how to run a business. (Washington)

Not to practice law as a business is in the spirit of public service. (Justice Pound's statement.) Nonetheless, lawyers need to know how to run their practice as a business, but very few do. (Washington)

There is probably more economic pressure on younger, new lawyers because of education expenses and business start-up costs than on older lawyers, and these economic pressures may lead to unprofessional behavior. (Washington)

The group was concerned with the manner in which the Commission's recommendations would be implemented. Judge Battaglia pointed out that the Commission would spearhead the recommendations before the Rules Committee, the Court and in presentations before other groups. (Wicomico/Somerset)

MINUTES OF THE TOWN HALL MEETINGS IN ALPHABETICAL ORDER

PROFESSIONALISM COMMISSION ALLEGANY COUNTY PRESENTATION MEETING OCTOBER 24, 2006

On October 24, 2006, at the Cumberland Country Club located in Cumberland, Allegany County, Maryland, the Professionalism Commission presented its final report to the Allegany County Bar. Nicholas J. Monteleone, Esquire, representative to the Professionalism Commission from Allegany County, arranged the meeting. Chief Judge Robert M. Bell was present. Judge Lynn A. Battaglia led the meeting and delivered the presentation.

In opening comments, Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the professionalism task force, to define and set forth specific standards of professionalism, and to direct and recommend to the Court ways to promote those standards. Judge Battaglia noted the unanimous sense of the Commission and the Bar that the area of Family Law generates the most complaints about unprofessional behavior. In addition, she highlighted the fact that discovery disputes constitute a major problem area addressed by the report. She also observed that smaller jurisdictions generally enjoy a greater sense of professionalism among practitioners than do urban areas, and that there appears to be a higher sense of professionalism in jurisdictions where judges are more involved in the community.

Judge Battaglia told the group that, although the Commission's report had been submitted to the Court, it has not yet been presented in open court and has not yet been acted upon. The Commission will meet to decide whether, in light of the comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Judge Battaglia called upon Mr. Monteleone to help summarize and explain the work of the Commission subcommittee on the unauthorized practice of law. Judge Battaglia then opened the floor for comments and discussion.

One participant questioned how local jurisdictions will receive funding for the training of those persons who ultimately will be appointed to counsel errant attorneys. Another participant questioned the source of funding for discovery masters. Judge Bell explained that these specifics have not yet been worked out.

A participant observed that there is a higher degree of professionalism and civility in rural areas, and expressed concern that too high a degree of civility may compromise the interest of the client. This participant further observed that clients sometimes believe lawyers have more loyalty to each other than to their clients. Judge Battaglia observed that advocacy and loyalty to one's client do not equate to a lack of civility, and that civility does not equate to a compromise of the client's interests. Judge Bell observed that there is an assumption that the

lawyer is competent, that civility and professionalism are superimposed on that assumption, and that it is not expected that the client's interests will be sacrificed.

A participant questioned the operation of proposed Rule 1-342, specifically as it pertains to the reference to a "*monetary award*."

A participant expressed concern regarding the proposed link between violations of the standards of professionalism and the Maryland Lawyers Rules of Professional Conduct.

A participant questioned how the unauthorized practice of law would be enforced if a person or entity is engaged in the unauthorized practice of law, but the consumer has not been harmed or has not complained. It was explained that enforcement of UPL is complaint driven, and that enforcement needs to be carried out by or on behalf of the consumer so as to avoid accusations of turf protection and also to avoid restraint of trade issues. The rule prohibiting persons not admitted to the bar from practicing law was cited as the fundamental basis for enforcement.

There being no further comments, Judge Battaglia invited further comment by way of email or letter directed to her office.

Judge Bell then made some closing comments stressing the importance of the issues addressed in the Commission's report, noting that a decline in professionalism is not a new issue, citing the well known attacks on judicial independence and the reputation of lawyers. He commended Judge Battaglia for her devotion to these matters over the last four or five years and expressed his confidence that the end result will make life better for lawyers.

Nicholas J. Monteleone,
Maryland Judicial Commission
on Professionalism

PROFESSIONALISM COMMISSION
ANNE ARUNDEL COUNTY PRESENTATION MEETING
NOVEMBER 9, 2006

On November 9, 2006, at the Anne Arundel Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar of Anne Arundel County to present the Report of the Professionalism Commission.

Rignal W. Baldwin, Jr., Esquire, representative to the Professionalism Commission from Anne Arundel County, introduced Judge Lynne A. Battaglia, Chair of the Court of Appeals Commission on Professionalism. Mr. Baldwin solicited comments and input – as blunt as it needs to be – in order to help the Commission in deciding the final form of recommendation to the Court of Appeals. Judge Battaglia acknowledged the work of Mr. Baldwin and of Linda H. Lamone, Esq., representative to the Professionalism Commission from the Attorney Grievance Commission. Accordingly, Judge Battaglia called upon them to review for the group the work of their respective subcommittees. Mr. Baldwin discussed the Commission’s recommendations with regard to Mentoring; Ms. Lamone reviewed the work of the subcommittee on the Unauthorized Practice of Law. Norman Smith reviewed the work of the subcommittee on Lawyers Who Exhibit Unprofessional Behavior.

Judge Battaglia recalled the Commission’s mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission’s Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia then opened the floor for comments and discussion.

With regard to the proposed changes to Judicial Canon 3 – will judicial referrals be anonymous? Will there be sanctions for judges who do not report? What is a “repeated and egregious” violation? How will we know?

Mandatory judicial evaluations should be instituted in every jurisdiction. Problems such as the possibility the evaluations will be used against incumbents in an election can be overcome. The alter ego program is not working. Another idea would be for the Bar Association to appoint a panel of lawyers to accept complaints about judges.

One problem area highlighted was that the Commission’s recommendations regarding the unauthorized practice of law are inconsistent with the treatment of pro se litigants.

The Court of Appeals has made it nearly impossible to successfully hold an attorney in contempt, even in the most egregious cases. The proposed new sanctions will fall victim to the same jurisprudence. The problems with enforcement that have plagued Rule 1-341 are likely also to render proposed new Rule 1-342 impotent without some change. A model might be the federal system, which has a zero tolerance for unprofessional behavior.

One area of unprofessional behavior has to do with the economics of law. Scheduling conferences and other ministerial tasks offer the opportunity to bill hours. This is part of the larger problem of churning cases for hourly billings. An example is found in the Court of Appeals opinion in *Piper Rudnick LLP v. Hartz*, 386 Md. 201 (2005), where one law firm charged over a \$1 Million in a case having to do with the attempted removal of a personal representative.

The Standards of Professionalism should include the duty to give clients a realistic estimate of prospective legal fees as well as a realistic prediction of the likely result, in order that a client can make a cost/benefit decision before the fees are out of hand. Judges should also look at the history of settlement negotiations before awarding attorney's fees in domestic matters.

The Commission's recommendations should include mandatory fee arbitration.

Complaints and referrals to counseling should be tracked from county to county so that judges will know what behavior is "repeated."

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
BALTIMORE CITY PRESENTATION MEETING
OCTOBER 17, 2006**

On October 17, 2006, at the Baltimore War Memorial, the Court of Appeals Professionalism Commission held a meeting of the bench and bar to present the Report of the Professionalism Commission.

Dwight W. Stone, Esquire, Baltimore City representative to the Professionalism Commission introduced Court of Appeal Chief Judge Robert M. Bell, who reviewed the history of the Professionalism Commission and its predecessor, the Court of Appeals Task Force on Professionalism. In September, 2002, the Task Force began a series of Town Meetings to learn from the Bar, statewide, about its perception of the state of professionalism within its ranks. The report of the Task Force led, in turn, to the formation of the Professionalism Commission, whose Report to the Court of Appeals will now be reviewed in every jurisdiction. With that, Judge Bell introduced Judge Battaglia, to lead the meeting.

Judge Battaglia thanked Judge Bell for his extraordinary involvement with the Bar and in the community. She also acknowledged and thanked Dwight Stone, Professor Byron Warnken, and Judge Jeannie J. Hong, for their work on the Commission Subcommittees on Mentoring and the Judge's Role in the Community. Judge Battaglia then asked these Commission members to review the work of their respective subcommittees for the group.

Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from the Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem area addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. However, everyone seems to agree that in jurisdictions where judges are involved in Bar activities there is a higher degree of professionalism.

Judge Battaglia then opened the floor for comments and discussion.

Several participants questioned the Commission's recommendations regarding sanctions for unprofessional behavior. Specifically, participants wanted to know if the proposed Standards

of Professionalism will be mandatory, and if so, whether motions for sanctions under proposed new Rule 1-342 will be an opportunity for abuse. In addition, the group was concerned with the due process implications accompanying the administration of sanctions.

On the one hand, it was pointed out, the Commission has recommended counseling for errant lawyers; but at the same time the Report recommends sanctions. This is confusing.

Because the trigger for sanctions is the “*repeated or egregious*” violation of the Standards of Professionalism, one participant expressed concern that an attorney demonstrating repeated behavior but in different jurisdictions would possibly escape notice and referral to counseling.

A number of comments were made concerning the difficulty judges have imposing sanctions under existing rules and whether this will become easier under the proposed new Rule 1-342 and Canon 3. In addition, proposed new Rule of Professional Responsibility 8.4 (h) may become just an “add on” in every AGC complaint.

One attendee commented that judges may act rude and unprofessional and questioned the applicability of the Commission’s recommendations to the judiciary.

The Commission was urged to avoid placing the burden of any mentoring program on the Young Lawyers Subcommittee of the Bar, a group that is already overburdened..

An important comment and recommendation was that the Commission view the proposed Standards of Professionalism as a “work in progress.” In the opinion of one participant, the Standards, as presently drafted, are incomplete and disorganized. Specifically, the Standards must focus on core values such as competence, integrity, and civility as important to the advancement of the rule of law. The Baltimore City Guidelines on Civility (appended to these minutes) were recommended to the Commission as a better exposition of professionalism.

It was also suggested that the Commission revisit the MSBA professionalism guidelines in place of the now proposed Standards of Professionalism.

Several participants questioned the Commission’s failure to address the issue of court security in light of recent acts of violence. What responsibility do lawyers have for their clients, when violent behavior can be anticipated? Do lawyers have a right to be outraged when required to pass through metal detectors; or to turn off cell phones in court?

Participants also opined that the Commission should take on the issue of “local rules.” Although such are not now allowed, they persist and are used against “non-locals.”

Judge Bell thanked everyone for attending, addressed the group and stressed the importance of professionalism as a core value of the profession. He pointed out that the purpose

of these meetings is not to impose ideas upon the Bar but rather to seek input in order that we may present a final report to the Court of Appeals that is a consensus document. With that, Judge Bell thanked Judge Battaglia and the Commission for its work thus far.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
BALTIMORE COUNTY PRESENTATION MEETING
NOVEMBER 15, 2006**

On November 15, 2006, the Baltimore County Bar Association hosted a dinner and meeting for the Court of Appeals Professionalism Commission to present and review its Report to the Court of Appeals with the Bench and Bar of Baltimore County.

Dana Williams, Esquire, representative to the Professionalism Commission from Baltimore County and Chair of the Commission's Subcommittee on Discovery Abuse, introduced Judge Lynne Battaglia, who acknowledged Dana's work on the Commission's Subcommittee on Discovery Abuse and called upon him to summarize and discuss his Subcommittee's deliberations.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Chief Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia acknowledged the impressive Baltimore County attendance, including a number of judges and retired judges. She then summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the areas of family law and discovery generate the most complaints about unprofessional behavior. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. However, everyone seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Several participants expressed the concern that the Commission's recommendations with regard to sanctions will cause the aspirational standards to become hard and fast rules. Also, the Standards of Professionalism are not clear as to their mandatory or aspirational content. For example, does "should" (as used in the Standards) mean "shall"?

Does proposed new rule 8.4 (h) overlap existing Rule 8.4, which prohibits behavior prejudicial to the administration of justice?

Who can be a complainant for suspected unauthorized practice of law?

Will the Standards of Professionalism be reworked to avoid prosecution of trivial matters?

Pro se litigants in the family law arena is an area that must be addressed.

The main problem in the discovery abuse area is delay. Why not more decisions without a hearing?

Proposed new Rule 8.4(h) and 1-342 put too much power in the hands of judges who may abuse it.

In discovery matters, Judges must have the power to fashion flexible remedies with all deliberate speed in order to cut the cost of litigation caused by these disputes.

One participant opined that he had not experienced unprofessional behavior over many years of practice.

The Report has a litigation bias. It needs more attention to the transactional side of the practice.

The Standards of Professionalism require a lawyer to “cooperate and compromise.” Is this in conflict with the duty to zealously represent our clients?

Litigation is too expensive. Large firms churn cases to generate fees, prejudicing litigants with fewer resources.

We should look at the federal example – zero tolerance for unprofessional behavior.

The terms “egregious” and “repeated” need to be clarified.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
CALVERT/ST. MARY'S COUNTY PRESENTATION MEETING
SEPTEMBER 13, 2006**

On September 13, 2006, at the Calvert County Circuit Court, the Court of Appeals Professionalism Commission held the second of a series of meetings to present the Report of the Professionalism Commission to the Bar.

Mark Davis, Esquire, Commission representative from Calvert County, introduced Judge Lynne A. Battaglia, who acknowledged the work of Mark Davis and former Commission member Larry Cumberland of Calvert County, present Commission member David Densford of St. Mary's County as well as the technical assistance of Dan Clark from the Court of Appeals media department. Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Chief Judge Bell, accompanied by Commission Reporter Norman Smith, will travel to every jurisdiction to receive comments from the Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission's Final Report, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem area addressed in the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. Everyone, however, agreed that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Judge Battaglia started the discussion by asking the participants, for purposes of discussion, to accept the findings of the Commission and premise that there is a professionalism issue to be addressed. The first question was how to define "bad lawyers." Several participants felt that this is a subjective issue which might lead to an abuse of power. This problem is inherent in defining unprofessional behavior in an adversarial arena. Obviously, there must be breathing room for speech in this regard.

Other participants pointed out the difference between large, urban jurisdictions and smaller counties, where uncivil and rude lawyers immediately develop an unfavorable reputation. Another problem in smaller counties is that clients sometimes interpret the collegial

atmosphere as a failure of lawyers to act sufficiently adversarial to one another. As a result, clients often hire out of county lawyers who, they feel, will be more aggressive. This implicates the larger question of whether unprofessional behavior is, in part, client-driven and raises the question of how we, as lawyers, can educate the public away from this perception.

The long term solution, said one participant, is to deal with less obvious and less egregious behavior before it gets out of hand. In this regard, several participants endorsed the Commission's recommendation of counseling. Counseling will be difficult, however, in smaller counties. One idea was to institute a lawyer alter-ego program similar to that already in place for judges.

All agreed with the Commission's observation that the greater the participation by the bench in Bar activities, the higher the degree of professionalism. Judges, many thought, are less accessible now than in previous times. Some courthouses encourage judges to be cordoned off from the public. Judge Bell pointed out that this is entirely a local decision.

Discovery abuse, identified by the Commission as a significant problem, is also ill-defined.

Judge Battaglia then introduced Chief Judge Bell, who thanked Judge Battaglia for her extensive work on the Commission, which, as Judge Bell pointed out, is above and beyond the call of duty. Judge Bell reminded the group that it was the MSBA's 2001 suggestion of a professionalism course for experienced lawyers that led to the Court of Appeals' formation of the Professionalism Task Force. First the Task Force, and now the Commission, is continuing to grapple with this important issue. The judiciary has no power beyond that given by the trust and confidence of the people, said Judge Bell. Judges are not advocates. They only decide what has been brought before them by the people, through lawyers. And the manner in which those cases are brought is the job of attorneys who must lead by an example of professionalism.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
CECIL COUNTY PRESENTATION MEETING
NOVEMBER 18, 2006**

The meeting began at the Cecil County Circuit Courthouse with a brief introduction by Judge Battaglia regarding the findings of the Professionalism Commission with the aid of a Power Point Presentation and handouts to the Bar Members.

During the Power Point Presentation, Victor R. Jackson, representative to the Professionalism Commission, spoke of the work of the subcommittee on the Judges' Role in the Bar and With Communities..

Following the Power Point Presentation by Judge Battaglia of the Report of the Professionalism Commission, the Members of the Cecil County Bar Association had the following comments, concerns and questions regarding the recommendations and report of the Professionalism Commission:

- A Bar Member asked Judge Battaglia whether a course on Professionalism is going to be a requirement.
 - o Judge Battaglia responded not at the present time; however, that option is still on the table and that the Task Force did not recommend the course.
 - o Further, such a course is not a precursor to CLE requirements.
- As a follow-up question, a Bar Member asked whether such a course would be for all Bar Members of the Bar or just for new Members.
 - o Judge Battaglia responded that the course is still on the table and has not been recommended by the Task Force to be mandatory for all attorneys.
 - o Judge Battaglia further commented that the course could be mandatory for all attorneys or could be tailored for errant attorneys.
- A Bar Member then commented that compared to other areas and states, he has found that Cecil County professionalism is very high and sanctions are not necessarily needed.
 - o Judge Battaglia responded that the issue of sanctions depends on enforcement at the Bar level and that they could explore expansion of sanctions at a later time.
- Another Bar Member stated that sanctions for errant attorneys should be made stiffer use the fines to fund the Commission instead of all attorneys bearing the cost.
 - o Judge Battaglia responded by stating that such funds are in the general fund and cannot be specified at this time.
 - o Judge Battaglia further stated that all these issues must be worked out and that they are not mandating specific ways to address the issues, as the culture is different in all counties.

- Another Bar Member replied that the issues also include errant Judges.
 - o Judge Battaglia replied that errant Judges will be addressed and that issues about judicial disabilities have been raised.
- A Bar Member asked about the potential assessment fee and suggested placing a cap on the amount of the assessment.
 - o Judge Battaglia responded that Maryland ranks as one of the states that requires the least amount for attorneys to pay in assessments; such an assessment may be added to the existing assessment, probably for approximately an additional \$5.00.
- Another Bar Member commented regarding the Committee's finding on Discovery problems and that Judges are reluctant to impose sanctions on attorneys.
 - o Judge Battaglia responded that it may be because a Judge wants to ensure that the client is not penalized.
 - o Bar Members then commented that often it is not the attorney's fault; rather the clients fail to respond to requests or are slow to produce the discovery.
 - o Judge Battaglia responded that there must be due process in all of this.
- A Bar Member questioned the problems between deadlines and the court calendar, specifically that there is friction between the Judges and attorneys because even if both sides agree, the Judges still deny postponement.
 - o Judge Battaglia responded that this issue has been previously raised.
- An additional Bar Member followed up and asked if the court calendar and issues regarding postponement was established by the Court of Appeals.
- A Bar Member stated that the assessment sounds minor; could it be linked to the attorney trust fund?
 - o Judge Battaglia responded yes, and they want to limit the amount of assessment mailings to attorneys and just have one assessment a year.
- A different Bar Member stated that he understood the need to put teeth into sanctions and wondered if the terms "egregious" and "repeated" would be more defined or expounded upon.
 - o Judge Battaglia stated that these findings must go before the Rules Committee or must go to the appropriate Committee.
 - o Judge Battaglia also stated that the Attorney Grievance Commission must have a role in the process.
 - o Judge Battaglia agreed that misconduct must be defined.
- A Bar Member questioned whether before a formal filing, an attorney can go to counseling before being reprimanded.
- A Bar Member further commented on Discovery Issues and that an attorney should document if it was the client's fault and not the attorney's fault.

- A Bar Member asked Judge Battaglia if the Professionalism course could be used for Pro Bono hours.
- Another Bar Member then stated that the Maryland Professionalism requirements are relatively simple compared to Pennsylvania and that it is not an overwhelming request to take a Professionalism course.

Judge Battaglia then concluded the meeting and all the attending members were invited to enjoy refreshments following the meeting.

Victor R. Jackson, Esquire
Member, Maryland Judicial
Commission on Professionalism

**PROFESSIONALISM COMMISSION
CHARLES COUNTY PRESENTATION MEETING
OCTOBER 26, 2006**

On October 26, 2006, the Charles County Bar Association hosted a dinner and meeting for the Court of Appeals Professionalism Commission to present and review its Report to the Court of Appeals with the Bench and Bar of Charles County.

Danny R. Seidman, Esquire, representative to the Professionalism Commission from Charles County, introduced Chief Judge of the Court of Appeals, Robert M. Bell. Chief Judge Bell opened the meeting by reviewing the history of the Professionalism Commission. Judge Bell then introduced Judge Lynne A. Battaglia, Chair of the Professionalism Commission.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism and to recommend to the Court ways to promote the standards. Judge Battaglia told the group that, although the Commission's Report has been submitted to the Court, it has not been presented in open Court and acted upon. The group was further informed that Judge Battaglia and Chief Judge Bell had traveled to many other Bar Associations already, and would travel to every jurisdiction in the State to present the Commission's report and recommendations and to receive comments from the Bar Associations. After receiving comments from the Bar, the group was informed the report may be modified before being presented in open Court.

Following the opening comments, Judge Battaglia presented the recommendations of the Commission with the aid of a Power Point Presentation and handouts to everyone in attendance. At Judge Battaglia's request, Danny R. Seidman presented the work of two of the subcommittees, the Subcommittee on Discovery Abuse Including the Use of Discovery Masters, and the Subcommittee on Judge's Role in the Bar and with Communities.

Following the Power Point Presentation, Judge Battaglia solicited comments and questions from the attendees.

An attendee commented that most incidents of unprofessional behavior are observed by other lawyers, not judges, and other lawyers are unlikely to report unprofessional behavior. Judge Battaglia responded that Rule 8.3 of the Maryland Rules of Professional Conduct already provides that lawyers have an ethical obligation to report violations. Judge Battaglia also commented that a similar issue was raised by a transactional attorney at another Town Hall meeting.

Another attendee commented that Rule 8.3 is only triggered in a situation where a lawyer has knowledge that another lawyer had violated rules, and that judges did not have the same reporting requirement under Rule 8.3.

Another attendee suggested that the reason that the rule only applied to a lawyer's observation is because judges rarely see the same behavior that the lawyer sees since lawyers generally behave better when they are before a judge. Judge Battaglia commented that Rule 8.3 could potentially be abused by attorneys.

Another attendee commented that he couldn't imagine that "all this" was necessary regarding the need for a Professionalism Commission, and that he couldn't see the need to have Mel Hirschman intruding any further into our personal and/or professional lives.

Another attendee voiced concern that they couldn't see expanding the Court's jurisdiction into another area, and that they didn't believe that it was the role of judges to report attorneys for unprofessional conduct to anyone other than Bar Counsel. The attendee said that if they were inclined to report inappropriate behavior to anyone it would be the Attorney Grievance Commission.

An attendee commented that they didn't believe unprofessional behavior was as much of a problem for judges because the offending party could be pulled aside by the Judge and reprimanded, and that would be sufficient to curb any inappropriate behavior.

An attendee commented that they believed unprofessional behavior was less of a problem in smaller jurisdictions because attorneys were more familiar with one another. Professionalism Committee member, Danny R. Seidman, responded that the same point was made by members of the Professionalism Committee at Committee meetings.

An attendee asked whether or not there was any empirical data to the support claim that there were fewer problems of unprofessional behavior with newer attorneys than with more experienced attorneys, and the relationship of continuing legal education classes (CLE) to any such data. Judge Battaglia responded that she has received comments that Pennsylvania, which requires CLE, has fewer problems compared to Maryland, but that there was no empirical data available.

Danny R. Seidman, Esquire
Member, Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
DORCHESTER COUNTY PRESENTATION MEETING
NOVEMBER 22, 2006**

On November 22, 2006 the Court of Appeals Professionalism Commission held a meeting in the Cambridge City Council Chambers in Dorchester County. At that time the Commission presented the Report of the Professionalism Commission to members of the Bar, as well as judges representing the local bench at all levels, including the Circuit, District, and Orphans' courts.

William H. Jones, Esquire, representative of the Professionalism Commission from Dorchester County, introduced Judge Lynne A. Battaglia, Chair of the Court of Appeals Commission on Professionalism. During that introduction, those present were reminded of the meetings held around the state earlier which led to the formation of the Commission. Judge Battaglia took the opportunity to discuss those issues which caused the Court of Appeals to initially study the matter of Professionalism in the legal profession.

Judge Battaglia explained the work of the Commission and reported that while the Report had been submitted to the Court of Appeals, it will not be presented in open Court and acted upon until early next year. Judge Battaglia discussed the Report with the assistance of a PowerPoint presentation. The presentation included a summary of the work of each sub-committee and each sub-committee's recommendations. Mr. Jones presented the work of the sub-committee that addressed the course for new admittees. Judge Battaglia noted during the presentation that family law and discovery disputes seemed to generate the most problems, and that practitioners in smaller or more rural areas felt a greater degree of satisfaction in that most issues that arose in these areas tended to be a bit self-correcting.

Judge Battaglia then turned the discussion over to the floor for comments and questions.

One Bar member questioned whether "Professionalism" can really be taught, and was concerned that this work may lead to more formal referrals to the Attorney Grievance Commission. Perhaps anything that results in a formal Attorney Grievance Commission referral should be conduct of a more egregious nature, and that the persons involved in such conduct, whether it be of an egregious nature or not, will probably find themselves before the Attorney Grievance Commission anyway.

Procedural issues were raised as well. One member questioned whether the Rules of Evidence would apply at any proceedings that may result from the work of the Commission. As well, the question of whether confidentiality would exist for those reporting unprofessional conduct was raised. Judge Battaglia noted that more informal mechanisms may be more effective in smaller areas.

On the question of the unauthorized practice of law, some wondered what procedures may be in place to address such claims.

Commenting on the notion that judges should be more involved in the community, one member noted that historically judges had been more aloof, and that such aloofness helped

insulate judges from claims of bias or prejudice. Judge Battaglia responded that such distance is a somewhat recent phenomenon, and that there exists now a belief that bringing judges into more active roles in the community helps raise the level of respect for the legal profession.

One member of the Bar noted that if civility and the settling of litigation are related, such concepts may be inhibited by a local rule that exists (not in Dorchester County) that imposes substantial fines on attorneys involved in cases that settle within ten days of trial.

Someone asked what attorneys seemed to want from proposed enhancements that are designed to improve professionalism. Judge Battaglia noted that requiring Continuing Legal Education had been a disfavored concept, and that a required professionalism course was disfavored as well, partially because of the impact on solo and small firm practitioners.

Finally, one Bar member commented on the behavior of some members of internet “listservs”, where attorneys can pose practical questions to other attorneys and engage in discussions. Some of those members apparently take pleasure in engaging in hostile and demeaning conduct toward others in a somewhat public way. The member noted that perhaps this type of conduct would be considered to be of the more egregious nature as discussed earlier.

Judge Battaglia then adjourned the meeting and invited those present to enjoy a light lunch provided by the local Bar.

William H. Jones, Esquire
Member
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
FREDERICK COUNTY PRESENTATION MEETING
SEPTEMBER 21, 2006**

On September 21, 2006, at the Frederick County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar to present the Report of the Professionalism Commission.

Tom Lynch, Esquire, the Frederick County representative to the Professionalism Commission, introduced Judge Lynne Battaglia. Judge Battaglia acknowledged Tom's work as Chair of the Commission's Subcommittee on the Standards of Professionalism, which set the stage and tone for the Commission's Report. Accordingly, Judge Battaglia called upon Tom to summarize and explain the work of his Subcommittee. Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel to every jurisdiction to receive comments from the Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. Everyone, however, seems to agree that in jurisdictions where judges are involved in Bar activities there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Tom Lynch started the discussion by asking the group for comments on the Commission's recommendations concerning imposing sanctions to enforce the Standards of Professionalism. This is an area that has drawn the most concern in meetings thus far. One participant commented that Masters should be empowered to impose sanctions, since lawyers, realizing the Master's limited authority, often misbehave in that forum. A judge pointed out that regardless of the potential sanction, judges must know of the wrongful behavior. Motions for sanctions must describe explicitly what has happened and the surrounding events. Another participant suggested that proposed new Rule 1-342 be strengthened to function like Federal Rule 11. Another participant was concerned that proposed new Judicial Canon 3 seems to take discretion from a judge, stating instead that a judge *shall* report repeated or egregious conduct to the Attorney Grievance Commission.

Several attendees remarked that attorneys lodge few complaints about the unauthorized practice of law because of the perception that such complaints are pointless and go nowhere.

Law may be a calling, said one participant, but failure to pay attention to the business end of the profession is what gets many lawyers in trouble.

One judge pointed out that in a child custody case, it is difficult to impose sanctions of any sort, since the purpose of the case is to effect the child's best interests.

Several attendees remarked that one aspect of professionalism not specifically addressed in the report has to do with attorneys refusing to communicate with one another. It is unprofessional and a disservice to clients for an attorney to refuse to talk about potential compromise and resolution of a matter or even about resolution of discovery problems.

One participant commented that lawyers do not want sanctions for discovery violations - Most lawyers just want the documents. Perhaps mandatory production as in the Federal Rules is an option.

Professionalism includes *pro bono* work. This will also help limit the number of *pro se* litigants. In this respect, there was discussion of the Court of Appeals recent "Civil Gideon" decision.

Chief Judge Bell thanked everyone for attending and stressed the importance of professionalism as a core value of the profession. He pointed out that the purpose of these meetings is not to impose ideas upon the Bar but to seek input in order that we may present a final report to the Court of Appeals that is a consensus document. With that, Judge Bell thanked Judge Battaglia, Laura Glasgow, Tom Lynch, Norman Smith, as well as the entire Commission for its work thus far.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
GARRETT COUNTY PRESENTATION MEETING
NOVEMBER 21, 2006**

On November 21, 2006, at the Garrett County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar to present the Report of the Professionalism Commission.

Master Daryl T. Walters, Garrett County representative to the Professionalism Commission, introduced Court of Appeals Chief Judge Robert M. Bell, who reviewed the history of the Professionalism Commission and its predecessor, the Court of Appeals Task Force on Professionalism. The Task Force having conducted town meetings in every jurisdiction, the Commission is now in the process of holding meetings in all jurisdictions in order to present its Report and to receive input and comments on the Report before it is presented to the Court of Appeals. Judge Bell, in turn, introduced Judge Lynne A. Battaglia, Chair of the Professionalism Commission.

Judge Battaglia thanked Judge Bell for his extraordinary involvement with the Bar and in the community. She also acknowledged and thanked Master Daryl Walters for his work on the Commission's Subcommittees on Discovery Abuse and asked Master Walters to review the work of his subcommittee for the group.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted discovery disputes as a significant problem area addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. However, everyone seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism.

Judge Battaglia then opened the floor for comments and discussion.

The participation of judges in community organizations, particularly charitable organizations which are involved in fund raising activities, puts judges' activities in potential conflict with judicial canons.

Discovery abuse may be the result of ignorance rather than misbehavior.

Mentoring is important in the progress of new lawyers who learn the process.

Proposed change to Judicial Canon 3, which states that judges “shall” report repeated or egregious violations of the Standards of Professionalism, is problematic. Will judges be sanctioned for failure to report?

The problem of discovery abuse could be addressed, in part, by the use of certain types of discovery tailored to the specific needs of certain cases, such as domestic relations actions.

Some of the Standards of Professionalism are in conflict with the need to zealously represent one’s clients. Can civility coexist with zealous advocacy? Will the Standards create a chilling effect on advocacy?

Judges may use the proposed new rules to harass lawyers.

The Standards must be reworked. The term “professionalism” is vague and the proposed Standards of Professionalism may be void due to the vagueness of its terminology.

Judge Bell thanked everyone for attending, addressed the group and stressed the importance of professionalism as a core value of the profession. With that, Judge Bell thanked Judge Battaglia and the Commission for its work thus far.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
HARFORD COUNTY PRESENTATION MEETING
OCTOBER 23, 2006**

On October 23, 2006, at the Harford County Circuit Court, the Court of Appeals Professionalism Commission held a meeting to discuss the Report of the Professionalism Commission.

Chief Judge Robert M. Bell began the meeting by reminding the group that it was the MSBA's suggestion, in 2001, of a professionalism course for experienced lawyers that led to the Court of Appeals' formation of the Professionalism Task Force, led by Judge Battaglia. In September, 2002, the Task Force held the first of its Town Meetings in Howard County to learn from the Bar, state-wide, about its perception of the state of professionalism within its ranks. The report of the Task Force led, in turn, to the formation of the Professionalism Commission, whose Report to the Court of Appeals will now be reviewed in every jurisdiction. With that, after publicly thanking Judge Battaglia for her tireless effort, Judge Bell introduced Judge Battaglia to lead the meeting.

Judge Battaglia first described the Commission's mission, which was to act upon the findings of the Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia noted that approximately two out of three Maryland attorneys have taken the Professionalism course and that we still find the concept of professionalism hard to define. It is more than just ethics. Perhaps "ethics plus, or even "ethics on steroids". Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from the Bar on the Report. Then, before the report is officially presented, the Commission will meet to decide whether, in light of comments from the Bar, the report should be modified before presentation to the Court of Appeals.

Judge Battaglia summarized the Commission's Final Report, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem area addressed by the Report. Also, she said smaller rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. But everyone seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Stimulated by Judge Battaglia's presentation, there were a number of insightful comments by members of the enthusiastic audience. There was a lively discussion about the

question of whether the recommendations should be aspirational or mandatory. Clearly noted was the fact that repeated and/or egregious conduct was sanctionable. It was further noted that the “process” contemplated referral to a local Bar group for voluntary counseling. Continued unprofessional conduct would move up the disciplinary chain. One participant noted that when you hear “That’s just (fill in the name)”! you know that person is professionally challenged . . . and, further, that most people in the Bar know who those persons are.

It is anticipated that Discovery disputes will be dealt with by Discovery Judges in larger counties and Discovery Masters in smaller counties. The relationship between advertising and professionalism was discussed. The consensus was that unprofessional advertisements should be controlled, or at least come within the parameters of this Commission’s recommendations.

Several of the speakers noted that a collegial and professional joint decision by counsel to continue a case was frequently met by a less than cooperative Judge who, concerned with various time deadlines and statistics, denied the joint request.

Several members suggested that serious thought be given to requiring mandatory attendance at a continuing education Professionalism class and, additionally, mandatory attendance at required Continuing Legal Education courses. One member suggested that the Continuing Professionalism Course be situationally oriented in the same manner as it is for new admittees, i.e., the Lawyer and (the Community) (the Court) (the Client) (other Lawyers).

Another person noted that Law School is very competitive and does not train one to be collegial and/or professional. Another noted that Law School does a poor job of distinguishing between the roles of the lawyer-advocate and the lawyer-counselor.

Finally there was a comment that an attorney’s appearance should be stricken as a matter of course when a jury trial is prayed in District Court. Chief Judge Bell noted that this comment would be passed on to the Rules Committee.

Overall, the Commission Report was well received. All participants seemed to have given it time and reflection.

Judge Bell closed the meeting by reaffirming the importance of the Commission’s goals, stressing that we attorneys should be leaders in a broader public effort toward civility and professional conduct.

Cornelius D. Helfrich
Substituting for Norman L. Smith, Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
HOWARD COUNTY PRESENTATION MEETING
SEPTEMBER 5, 2006**

On September 5, 2006, at the Howard County Circuit Court, the Court of Appeals Professionalism Commission held the first of a series of meetings to present the Report of the Professionalism Commission to the Bar.

The Honorable Dennis M. Sweeney, Howard County, Commission representative from Howard County, introduced Chief Judge Robert M. Bell. Judge Bell reminded the group that it was the MSBA's suggestion, in 2001, of a professionalism course for experienced lawyers that led to the Court of Appeals' formation of the Professionalism Task Force, led by Judge Battaglia. In September, 2002, the Task Force held the first of its Town Meetings in Howard County to learn from the bar, statewide, about its perception of the state of professionalism within its ranks. The report of the Task Force led, in turn to the formation of the Professionalism Commission, whose Report to the Court of Appeals will now be reviewed in every jurisdiction. With that, Judge Bell introduced Judge Battaglia, to lead the meeting. Judge Battaglia first described the Commission's mission, which was to act upon the findings of the Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from the Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission's Final Report, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem area addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. But everyone seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

One of the first areas of discussion involved the Commission's recommendations concerning sanctions for unprofessional behavior among attorneys, namely proposed new Rule 1-342, new Rule of Professional Conduct 8.4(h) and additions to Judicial Canon 3. Several participants felt that these provisions might simply escalate disputes, spawning complaints and cross-complaints in every case. There was some feeling that there should be a way to address this issues short of a resort to sanctions. This possibility was later addressed in the presentation of the Commission's proposal of counseling for errant attorneys.

Some participants questioned one of the basic premises for the Report: whether the behavior of habitual unprofessional lawyers can be changed. First, some observed, we must find

the reasons for bad behavior. Has the nature of the profession changed its members, resulting in bad behavior? To address this, one participant suggested, in a seminar context, a demonstration of bad behavior in a way that might embarrass those who recognize themselves. Public education is also very important. Prospective clients should be educated to seek good lawyers who will present the client's case in the best way possible, but who will not escalate disputes unnecessarily. In other words, uncivil behavior should not be client driven.

One participant suggested that the professionalism course for new admittees might be given after several years of practice, rather than right away. Judge Battaglia explained the Commission's consideration and ultimate rejection of that proposal.

There was general consensus that the greater use of discovery masters would be of great help in easing tensions, particularly in the domestic law area.

Overall, the Commission Report was well received. All participants seemed to have given it time and reflection.

Judge Bell closed the meeting by re-affirming the importance of the Commission's goals, stressing that we attorneys should be leaders in a broader public effort toward civility and professional conduct.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
UNIVERSITY OF MARYLAND LAW SCHOOL FACULTY
PRESENTATION MEETING
NOVEMBER 28, 2006**

On November 28, 2006, the University of Maryland Law School hosted a luncheon and meeting for the Court of Appeals Professionalism Commission to present and review its Report to the Court of Appeals.

Professor Abraham A. Dash, representative to the Professionalism Commission from the Law School, introduced Judge Lynne Battaglia, who acknowledged Professor Dash's work on the Commission's Subcommittee on Professionalism Guidelines and Sanctions and called upon him to summarize and discuss his Subcommittee's deliberations and recommendations.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Commission Reporter Norman Smith, have traveled again to every jurisdiction to receive comments from Bar on the Report. Chief Judge Bell has attended as many meetings as possible, consistent with his duties as Chairperson of the Counsel of Chief Judges. As a result of the input gathered, the Commission has additional work to do by way of modifying the report to include certain often voiced concerns from the bench and Bar.

Judge Battaglia summarized the Commission's Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the areas of family law and discovery generate the most complaints about unprofessional behavior. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. Everyone, however, seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Several participants expressed the concern that the Commission's recommendations do not adequately take transactional practice into consideration.

The quality and temperament of trial judges varies throughout the State, as do local procedures. Lawyers should have some fair notice of what is expected in different jurisdictions.

Attorney misconduct is often caused by judicial misconduct, specifically the failure of judges to enforce the rules fairly and impartially.

One half of all civil disputes are filed in domestic causes, which validates the Commission's focus on domestic law as one of the most litigious areas. It may be worthwhile to consider separate guidelines in this area.

We might want to consider certification of lawyers as competent and experienced in different areas.

The Standards of Professionalism should specifically include nondiscrimination on the basis of sexual orientation.

Data from local Bar counseling should be kept to identify repeat offenders.

The Commission should specifically address problems with e-filing and e-discovery.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
MONTGOMERY COUNTY PRESENTATION MEETING
NOVEMBER 28, 2006**

On November 28, 2006, at the Montgomery County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar of Montgomery County to present the Report of the Professionalism Commission.

Karen Federman-Henry, Esq. Representative to the Commission from Montgomery County, introduced Judge Lynne A. Battaglia, Chair of the Court of Appeals Commission on Professionalism. Judge Battaglia acknowledged Karen's work on the Commission's Subcommittees on Standards of Professionalism and a Development of a Professionalism Course for Lawyers Exhibiting Unprofessional Behavior.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, have traveled to every jurisdiction - Montgomery County being the last - to receive comments from the bench and Bar on the Report. In early January, the Commission will meet to review and revise the Report in the light of comments from the Bar.

Judge Battaglia called upon Karen Federman-Henry, who reviewed the work of the Commission's Subcommittees on Standards of Professionalism and a Development of a Professionalism Course for Lawyers Exhibiting Unprofessional Behavior.

Judge Battaglia presented the entire report and then opened the floor for comments and discussion.

Many lawyers embroiled in discovery disputes cite the discovery opinions that the Commission has recommended be made public.

The Standards of Professionalism are new and not well understood. The standards should be clear in order that lawyers have fair notice of what is required to avoid sanctions.

Can judges be sanctioned for failing to report those who may have violated the Standards?

Will the new sanctions empower judges to harass lawyers?

A better system of mentoring, certification of skills, or a barrister system would go a long way toward addressing the problem.

Judges and attorneys should show respect for one another by shaking hands in view of the jury and clients – using as a model the Fourth Circuit’s tradition.

Pro se litigants add to the problem, since they are not constrained as lawyers are.

Judicial ethics rulings have kept judges from community participation. The Professionalism Commission’s recommendations will help.

Mandatory CLE would be helpful.

Large firms generally have a more professional practice, because there is more opportunity for mentoring.

The alter ego program – now disbanded – was useful. Something should replace it.

What quantum of evidence to sustain sanctions? preponderance? clear and convincing?

The sanctions recommendations as now written do not adequately address due process issues for those accused.

Misbehaving lawyers could be required to allow videotaping of their conversations and presentations.

We can learn from the medical profession – need internships and more mentoring.

Standards should be aspirational. Existing law is sufficient for sanctions.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
PRINCE GEORGE'S COUNTY PRESENTATION MEETING
NOVEMBER 14, 2006**

On November 14, 2006, at the Prince George's County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar of Prince George's County to present the Report of the Professionalism Commission.

After a buffet dinner, the group met in the jury assembly room. The Honorable William D. Missouri, County Administrative Judge, introduced all attending judges and other dignitaries, acknowledging Court of Appeals Chief Judge Bell's absence due to illness. Judge Missouri then introduced Judge Lynne A. Battaglia, Chair of the Court of Appeals Commission on Professionalism. Judge Battaglia acknowledged the work of Professionalism Commission members present, including Court of Special Appeals Judge James P. Salmon, Chair of the Commission's Subcommittee on Mentoring, Felicia Love Greer, Esq., Prince George's County Representative to the Commission and member of the Subcommittee on Mentoring, Deborah L. Potter, Esq., Chair of the Commission's Subcommittee on the Professionalism Course for New Admittees to the Bar, Steven P. Lemmey, Esq., Representative to the Commission from the Judicial Disabilities Commission and member of the Commission's Subcommittee on the Judge's Role in the Community, and Norman L. Smith, Esq., the Commission's Reporter and Chair of the Subcommittee on Development of a Professionalism Course for Lawyers Exhibiting Unprofessional Behavior.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Chief Judge Bell, accompanied by Commission Reporter Norman Smith, are in the process of traveling to every jurisdiction to receive comments from the Bench and Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia called upon Judge Salmon, who reviewed the work of the Commission's Subcommittee on Mentoring, Deborah Potter, who reviewed her Subcommittee's work on the existing Course for New Admittees, Steve Lemmey, who reported on his Subcommittee's deliberations and recommendations on the Role of Judges at the Bar and in the community, and Norman Smith, who discussed the work of the Subcommittee on Development of a Professionalism Course for Lawyers Exhibiting Unprofessional Behavior.

Judge Battaglia presented the entire report and then opened the floor for comments and discussion.

Mandatory CLE would be a simpler and more effective way to deal with the problem of unprofessional behavior at the Bar.

There may be an overlap and/or conflict between the Rules of Professional Conduct and the Standards of Professionalism as the Standards are now drafted. The Standards need to be more clear and better organized as to what is mandatory and what is aspirational.

Professionalism could be improved by requiring lawyers to be certified as practitioners in specific areas of the law. Problems arise because lawyers practice in areas where they do not have sufficient knowledge or comfort.

The Discovery Abuse Subcommittee should focus on ways to effect immediate resolution of disputes – the main problem.

One of the main aspects of unprofessional behavior is lawyers “churning” cases to maximize billable hours.

Proposed new Rule 1-342 and Rule 8.4 (h) may have a chilling effect on zealous advocacy. There should be graduated sanctions.

If, under the proposed changes to Judicial Canon 3, a judge does not report “repeated and egregious” violations of the Code of Professional Responsibility to the Attorney Grievance Commission, can that judge be sanctioned for failing to report?

The Commission’s Report seems to focus almost entirely on litigation, while many problems exist in the transactional arena.

Out of State lawyers who pass the MD Bar and intend to practice here, should take the professionalism course along with new admittees.

Proposed new Rule 8.4 (e) could be a comment.

The Commission should give more attention to gender and race-based unprofessional behavior.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

PROFESSIONALISM COMMISSION
QUEEN ANNE'S/KENT COUNTIES PRESENTATION MEETING
OCTOBER 3, 2006

On October 3, 2006, at the Queen Anne's County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar of Queen Anne's and Kent Counties to present the Report of the Professionalism Commission.

Donald Braden, Esquire, representative to the Professionalism Commission from Queen Anne's County, introduced Court of Appeals Chief Judge Robert M. Bell, who reviewed the history of the Professionalism Commission and its predecessor, the Court of Appeal Task Force on Professionalism. Judge Bell then introduced Judge Lynne A. Battaglia, Chair of the Professionalism Commission.

Judge Battaglia acknowledged the work of Don Braden and Dan Saunders, representatives to the Commission from Queen Anne's and Kent Counties respectively, and called upon them to review for the group the work of their subcommittees. Mr. Saunders discussed the Commission's recommendations with regard to sanctions and Mr. Braden reviewed the work of the subcommittee on the Role of Judges in the Community.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. However, everyone seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Participants asked for clarification of the relationship between Rule 1-341 and proposed new Rule 1-342. In addition, a judge suggested that the Report make clear that proposed Rule 1-342 does not affect the doctrine of contempt – that the two are separate.

The Commission's recommendations with regard to lawyer-counseling were questioned because of the Commission's recommendation that the results not be made public. There was some concern that "bad apples" should not be hidden. There was also the suggestion that counseling be mandatory. Records should be kept, one participant suggested, and made public after several occurrences. There was also the worry that local Bar associations – particularly in small counties – may have trouble counseling their own.

Recommendations with regard to discovery abuse seemed to be a "one size fits all" solution that is less necessary in small counties.

The Court should consider a voluntary professionalism course for experienced lawyers.

The recommendation that "repeated and egregious" conduct be sanctioned drew questions such as how any unprofessional conduct cannot be "egregious." Sanctions, some worried, will become a sword rather than a shield, with unprofessional lawyers filing 1-342 motions with the same frequency as federal Rule 11 motions.

Several participants were concerned about the due process rights to be afforded any lawyer sanctioned under proposed new Rule 1-342. This, Judge Battaglia explained, will be fleshed out before the Rules Committee, if it acts upon the recommendation.

Discovery solutions in different counties may lead to inconsistent results state wide.

At the conclusion of the meeting, Judge Souse presented Judge Bell with a tie, on the occasion of Judge Bell's having been named Chair of the National Association of Chief Judges.

Chief Judge Bell addressed the group, noting that lawyers are, and should be, responsible for the maintenance of the rule of law. And we should make our services available to everyone, remembering that we are in a profession, not a business. Judge Bell then thanked everyone for participating and giving the Commission input toward the Professionalism Commission's eventual presentation to the Court of Appeals.

After the meeting, a participant wrote Judge Battaglia, commenting that the Commission has focused its work on litigation in Maryland Courts, overlooking problems in the representation of clients in administrative hearings and before regulatory commissions. Transactional law also seems to have been given short shrift.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
TALBOT/CAROLINE COUNTIES PRESENTATION MEETING
OCTOBER 31, 2006**

On October 31, 2006, at the Talbot County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and bar of Talbot and Caroline Counties to present the Report of the Professionalism Commission.

Chief Judge of the Court of Appeals, Robert M. Bell, opened the meeting by reviewing the history of the Professionalism Commission and its predecessor, the Court of Appeals Task Force on Professionalism. Judge Bell then introduced Judge Lynne A. Battaglia, Chair of the Professionalism Commission,, who.

Judge Battaglia acknowledged the work of Robert J. Greenleaf, Esq., representative to the Professionalism Commission from Caroline County and Michael O'Connor, Esq., representative to the Commission from Talbot County. Accordingly, Judge Battaglia called upon them to review for the group the work of their respective subcommittees. Mr. Greenleaf discussed the Commission's recommendations with regard to sanctions; Mr. O'Connor reviewed the work of the subcommittee on the Professionalism Course for New Admittees. Norman Smith reviewed the work of the subcommittee on Lawyers Who Exhibit Unprofessional Behavior.

Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Chief Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted discovery disputes as a significant problem area addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. Everyone, however, seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism.

Judge Battaglia then opened the floor for comments and discussion.

Participants expressed concern about the seemingly aspirational tone of the proposed Standards of Professionalism. Specifically, participants questioned whether the proposed duty to

cooperate and compromise is in conflict with the duty zealously to represent one's client. "Clients have a right to be uncompromising." is the way one attendee expressed the concern.

The Standards of Professionalism need to be reworked in order to clearly delineate between the aspirational and mandatory provisions.

The Standards of Professionalism should include the duty to make justice available to all and specifically, to seek out opportunities to provide pro bono representation.

The Standards do not sufficiently address the leadership role of the judiciary. The judge sets the tone of dignity and civility in his or her courtroom – the most important role. Accordingly, the Standards should also impose specific standards upon the judiciary. One attendee forwarded additional materials which are attached to these minutes.

In discovery disputes, the Master should assess costs to a misbehaving party.

District Court judges do not have the time to sift through discovery disputes and motions. These should be diverted to another tribunal or decision maker to keep the District Court docket moving.

In smaller Counties, the Commission's recommendation for a larger Judge's role increases the chances for recusal.

The public should be educated about the legal process – what we do and how we do it.

Judge Bell concluded the meeting by pointing out that, although courts are often under attack, they can only decide what is brought before them. This underscores the important role of lawyers in the administration of justice. The way we treat one another reflects the dignity and integrity of the profession.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
WASHINGTON COUNTY PRESENTATION MEETING
OCTOBER 25, 2006**

On October 25, 2006, in Court Room 1 of the Washington County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and the Washington County Bar Association to present the Report of the Professionalism Commission.

William P. Young, Jr., Esquire, the Washington County representative to the Professionalism Commission, introduced Judge Lynne Battaglia and noted that Chief Judge Bell would be joining the meeting shortly. Judge Battaglia acknowledged Bill's work as a Member of the Commission's Subcommittee on the Standards of Professionalism, which set the stage and tone for the Commission's Report. Accordingly, Judge Battaglia called upon Bill to summarize and explain the work of his Subcommittee. Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Chief Judge Bell, accompanied by Commission Reporter Norman Smith, are traveling to every jurisdiction to receive comments from the Bar on the Report. (Norman Smith, reporter for the Commission is vacationing in Hawaii and William P. Young, Jr., is acting as the reporter pro tem for this meeting.) Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem addressed by the Report. Also, she said, practitioners in smaller, rural jurisdictions generally believe that they enjoy a greater sense of professionalism among practitioners because they know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. Everyone, however, seems to agree that in jurisdictions where judges are involved in Bar activities there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

There were numerous comments and suggestions:

- One participant suggested that the proposed annual assessment for lawyers be higher for urban lawyers than for rural lawyers.
- Another participant wondered what percentage of current attorneys practicing in Maryland have taken the Professionalism Course since it was instituted in 1992. [Chief Judge Bell estimated that about 2/3 of the approximately 30,000 current attorneys have taken the course.]

- Several participants reacted to the proposed Rule 1-342(h):
 - (A) One attorney's visceral reaction was that this would be an "eyes on" review by a judge, not a report to a judge. If behavior is outside of courtroom, the duty falls to other lawyers to report (i.e., unprofessional behavior by transactional attorneys).
 - (B) Rule 1-342(h) will be a controversial rule. There is a distinction between aspirational guidelines and codification; codification may be a problem. Gradations in definition of abuse can be a tough issue for enforcement. How do you balance the codification of abuses against the rights of attorneys?
 - (C) The proposed rule departs from mediation effort that is being encouraged by the Attorney Grievance Commission.
 - (D) The gradation of response is subjective rather than objective. This concerns one participant who worried about how sanctions will be applied.
- One attorney commented that perhaps much of the perceived lack of professionalism can be driven by lawyers who are less than successful economically. Attorneys need to know how to run a business.
- Not to practice law as a business is in the spirit of public service. (Justice Pound's statement.) Nonetheless, lawyers need to know how to run their practice as a business, but very few do.
- There is probably more economic pressure on younger, new lawyers because of education expenses and business start-up costs than on older lawyers, and these economic pressures may lead to unprofessional behavior.
- The monetary awards are modeled on Rule 11.
- Unauthorized Practice of Law. Bankers, accountants and Realtors are practicing law, but complaints fall on "deaf ears." An example of unfair competition: in estate proceedings, attorneys are required to obtain approval of their fees as the Personal Representative or as the attorney for the Personal Representative. Yet accountants do not have to have their fees approved.
- Advertising. Will this be dealt with specifically in the indicia of professionalism?
- One attorney commented that the culture of professionalism is quite good in Washington County. Perhaps the problems are more egregious in urban areas. Perhaps in larger jurisdictions there is a lack of communication between the Bar and the judges that is a contributing factor in the lack of professionalism. It is a concern that the adoption of standards might be used by one attorney to "get at" another attorney. There is that risk.

- Has the Commission thought about how a complaint of unprofessional behavior will be initiated? What standards will be employed? For example, with discovery disputes, there are more critical ramifications to the delay in criminal cases than in civil cases.
- To what degree was the issue of civility among lawyers considered? This appears to be more of an urban problem than a rural problem. There are standards of civility insisted upon in Pennsylvania that enhance the professional behavior of attorneys.
- Adopting standards and indicia may increase the stress on lawyers.
- Did the Commission discuss *pro se* litigants? [Chief Judge Bell reported that Judge Green is heading up a group studying policy toward *pro se* litigants and how judges deal with them.]
- Additional comments made by participants after the close of the meeting:

(A) A judge commented that he was happy to see the proposed addition to Judicial Canon 3, especially the directive “shall”.

(B) An attorney commented that is a sad sign of the overall lowering of professional standards that only one attorney stood while addressing the judges during the meeting.

Chief Judge Bell thanked everyone for attending and stressed the importance of professionalism as a core value of the profession. He pointed out that the purpose of these meetings is not to impose ideas upon the Bar but to seek input in order that the Professionalism Commission we may present a final report to the Court of Appeals that is a consensus document. With that, Chief Judge Bell thanked Judge Battaglia for undertaking this effort, and noted the hard work of Jacqueline Lee, Laura Glasgow, Norman Smith, and William P. Young, Jr., as well as the entire Commission, for its work thus far.

William P. Young, Jr.
 Reporter Pro Tem
 Maryland Judicial Commission
 on Professionalism

**PROFESSIONALISM COMMISSION
WICOMICO/SOMERSET COUNTY PRESENTATION MEETING
SEPTEMBER 26, 2006**

On September 26, 2006, at the Wicomico County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar of Wicomico and Somerset Counties to present the Report of the Professionalism Commission.

Jim Otway, Esquire, representative to the Professionalism Commission from Wicomico County, introduced Judge Lynne Battaglia. Judge Battaglia acknowledged the work of Jim Otway and Kristy Hickman, representatives to the Commission from Wicomico and Somerset Counties, who were also members of the Commission's Subcommittee on the Role of Judges in the Community. Accordingly, Judge Battaglia also called upon Jim and Kristy to summarize and explain the work of their Subcommittee. Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel to every jurisdiction to receive comments from the Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. Everyone, however, seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Several participants were concerned about what due process rights would be afforded any lawyer sanctioned under proposed new Rule 1-342. This, Judge Battaglia explained, will be fleshed out before the Rules Committee, if it is asked to act upon the recommendation by the Court. A related question concerned the potential problem with the Commission's proposed counseling program in the smaller counties, where a lawyer being counseled might be uncomfortable with close associates. Judge Bell pointed out that years ago, the local Bar associations once were charged with the responsibility of prosecuting violations of the Rules of Professional Conduct. The Attorney Grievance Commission was instituted primarily because of the perception that local Bar associations were too lenient with their members. These counseling sessions should be non-confrontational and collegial.

The group was concerned with the manner in which the Commission's recommendations would be implemented. Judge Battaglia pointed out that the Commission would spearhead the recommendations before the Rules Committee, the Court, and in presentations before other groups.

One participant asked if the Commission had considered the Delaware model of apprenticeship, which it had, as a result of suggestions made first by the Wicomico County Bar.

One participant expressed concern over lawyer advertising, and gave Judge Battaglia several examples of egregious advertising. Judge Battaglia promised that the Commission would refer the matter and materials to the Attorney Grievance Commission. Judge Bell pointed out that we must make our colleagues care that this sort of activity cheapens the profession.

Several attendees asked how judges will decide what behavior is unprofessional enough to warrant sanctions. Judge Battaglia explained that the inclusion of the terms "repeated or egregious" is a first step in distinguishing actionable conduct from isolated incidents.

One participant, a newly admitted attorney, observed that attorneys entering the profession will learn behavior from the Bar. The issue of professionalism can be addressed, in large part, by the example we set.

Chief Judge Bell addressed the group, noting that even in colonial times, lawyers were thought to be "the scourge of the colonies." And now, lawyers are often the targets of national political campaigns. But lawyers are, and should be, responsible for the maintenance of the rule of law. And we should make our services available to everyone, remembering that we are in a profession, not a business. Judge Bell then thanked everyone for participating and giving input toward the Professionalism Commission's eventual presentation to the Court of Appeals.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

**PROFESSIONALISM COMMISSION
WORCESTER COUNTY PRESENTATION MEETING
OCTOBER 30, 2006**

On September 26, 2006, at the Worcester County Circuit Court, the Court of Appeals Professionalism Commission held a meeting of the bench and Bar of Worcester County to present the Report of the Professionalism Commission.

Bill Hudson, Esquire, representative to the Professionalism Commission from Worcester County, introduced Judge Lynne Battaglia, who acknowledged Bill's work on the Commission's Subcommittee on the Role of Judges in the Community and called upon Bill to summarize and explain the work of his Subcommittee. Judge Battaglia recalled the Commission's mission, which was to act upon the findings of the Professionalism Task Force, to define and set forth specific Standards of Professionalism, and to recommend to the Court ways to promote those standards. Judge Battaglia then told the group that, although the Commission's Report has been submitted to the Court, it will not be presented in open Court and acted upon until early next year. Meanwhile, Judge Battaglia and Judge Bell, accompanied by Commission Reporter Norman Smith, will travel again to every jurisdiction to receive comments from Bar on the Report. Then, before the report is presented, the Commission will meet to decide whether, in the light of comments from the Bar, the report should be modified.

Judge Battaglia acknowledged the impressive turnout – nearly 100 percent of the Worcester County Bar, including all Judges -- District, Circuit and Appellate. She then summarized the Commission Report, as set forth in handouts to the group, giving a brief synopsis of each subcommittee's work and recommendations. Specifically, she noted the unanimous sense of the Commission and the Bar that the area of family law generates the most complaints about unprofessional behavior. In addition, Judge Battaglia highlighted the area of discovery disputes as a significant problem addressed by the Report. Also, she said, smaller, rural jurisdictions generally enjoy a greater sense of professionalism among practitioners who know and interact with one another regularly. By way of contrast, urban and suburban jurisdictions have more problems. However, everyone seems to agree that in jurisdictions where judges are involved in Bar activities, there is a higher degree of professionalism. Judge Battaglia then opened the floor for comments and discussion.

Several judicial participants questioned the need for submission of speeches to the Court Information Office. Judge Battaglia clarified this by explaining that the Commission does not propose that submission be mandatory. It is simply a resource for any judge who might want to have someone look at a proposed speech before it is given.

Several participants expressed concern that the Commission may have rushed to address a problem that is mostly one of perception. Furthermore, one participant expressed the sentiment that "we cannot resurrect Atticus Finch." Professionalism was doomed, opined another attendee, with the Supreme Court's decisions opening the door to extensive lawyer advertising.

The responsibility for mentoring young lawyers along the path to professionalism should be with partners in large firms, who otherwise pressure associates simply to bill hours.

The problems of professionalism are confined to the larger jurisdictions.

Several judges discussed the issue of a Judge's participation in community organizations, particularly political organizations and charitable groups who solicit contributions from the Bar or from the public. Judges should be more involved, and a change in the Canons is welcome to clarify what is allowed.

Does proposed new Rule 1-342 preempt contempt?

What due process protections will accompany the proposed sanctions? Is there an inherent conflict between the proposed new rules and the existing Rule of Professional Conduct requiring zealous representation of clients?

There is a concern that monetary sanctions may be passed on to and be borne by the client, a potential injustice.

Several participants worried that the proposed new rules and sanctions will create another level of discipline, in addition to the Attorney Grievance Commission.

Judge Cathell pointed out to the group that, when the Court of Appeals takes up the Commission's recommendations, it will act in a quasi-legislative capacity. All members of the Bar who wish to be heard on this subject should attend.

Judge Eschenburg thanked everyone for attending and announced that all were invited for lunch following the meeting.

Norman L. Smith
Reporter
Maryland Judicial Commission
on Professionalism

SUPPLEMENTAL REPORTS OF THE SUBCOMMITTEES

Supplemental Report of the Subcommittee on Standards of Professional Conduct, Including Identifying Indicia of Professionalism

March 21, 2007

In response to comments that the Standards and Indicia of Professionalism (the “Standards”) do not provide adequate notice of what conduct will incur sanctions from a court or the Attorney Grievance Commission, this subcommittee was asked to reconsider the Standards and make them more precise. Because the subcommittee remains comfortable that the overall Standards must remain aspirational and, therefore, must remain conceptual, we propose the following compromise.

The subcommittee recommends that the Commission present the Standards, as revised and clarified, to the Court of Appeals as the aspirational concepts that they represent, along with the following more precise rules of conduct, the violation of which could support imposition of sanctions if such violation is repeated or egregious. For example, no one would expect a failure to participate in public service to rise to the level of a “repeated or egregious” violation of the Standards, while circumstances that show chronic inability to appear on time or meet deadlines may warrant the imposition of sanctions or other appropriate disciplinary actions.

The rules of conduct that follow are based on the Bar Association of Baltimore City Guidelines on Civility. Rather than adopting these Guidelines in their entirety, the subcommittee has collected elements from the Guidelines that are sufficiently precise to be enforced and that address professionalism in both litigation and non-litigation contexts.

Proposed Rules of Professionalism

1. A lawyer shall treat all persons with courtesy and respect and at all times abstain from rude, disruptive and disrespectful behavior, even when confronted with rude, disruptive and disrespectful behavior.
2. A lawyer shall speak and write civilly and respectfully and without intentional distortion or falsehood in all communications with the court, public bodies and agencies, clients, and colleagues.
3. A lawyer shall refrain from manifesting, by words or conduct, bias or prejudice.
4. A lawyer shall be punctual and prepared for all court appearances and meetings, so that hearings, conferences, depositions, trials, and negotiations may commence on time.
5. A lawyer shall comply with schedules or deadlines set by the court. In non-litigation

settings, a lawyer shall respond timely to inquiries from opposing counsel or negotiate a reasonable time in which to respond.

6. Agreement to a date for a meeting or conference represents a commitment that shall be honored, absent compelling circumstances. When compelled to cancel such a date, a lawyer shall notify all concerned as early as possible.
7. A lawyer shall show respect for the legal system through appearance, conduct, dress, and manner.
8. A lawyer shall neither intentionally ascribe to an adversary or opposing party a position he or she has not taken, nor create a “record” of events that in fact have not occurred.
9. A lawyer shall not engage in any conduct that brings disorder or disruption to a hearing, a courtroom or to any other legal proceeding or transaction.
10. A lawyer shall advise his or her clients and witnesses of the proper conduct expected of them and endeavor to prevent clients and witnesses from creating disorder and disruption in court or any other setting.
11. A lawyer appearing in a public proceeding (primarily hearings or trials) shall be attired in a manner that connotes respect for the tribunal, and shall request that clients and witnesses be appropriately attired.
12. A lawyer shall stand when addressing the court, except when the court has granted permission to remain seated.
13. A lawyer shall act and speak respectfully to all public officials, court personnel, parties, attorneys, and clients with an awareness that they are an integral part of the legal system. A lawyer shall avoid displays of temper toward public bodies, the court, court personnel, parties, attorneys, and clients in all settings.
14. A lawyer shall not seek extensions or continuances for the purpose of harassment or prolonging litigation.
15. A lawyer shall not refuse to grant a reasonable time extension to opposing counsel solely for the sake of appearing “tough,” and shall advise his or her clients against using this strategy.
16. A lawyer shall not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities in any written or oral communication in any context, nor rely on facts that are not properly a part of the information available to the parties or placed in a court record.
17. A lawyer shall not disparage the intelligence, ethics, morals, integrity or personal behavior of opposing counsel in written submissions or oral representations, unless these matters are directly and necessarily in issue.
18. A lawyer shall not lightly seek sanctions and shall not seek sanctions against or disqualification of another lawyer for any improper purpose.
19. A lawyer shall adhere to express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.
20. When committing oral understandings to writing, a lawyer shall do so accurately and

completely. A lawyer shall provide other counsel with a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

21. When permitted or required by court rule or otherwise, a lawyer shall draft orders that accurately and completely reflect the court's ruling. A lawyer shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.
22. A lawyer shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. A lawyer shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Ideals of Professionalism

As a lawyer, I will aspire to:

- ▶ Put fidelity to clients before self-interest.
- ▶ Be a model of respect to those who resolve disputes and to those who participate in the process.
- ▶ Avoid all forms of wrongful discrimination in all of my activities, including discrimination on the basis of race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status. Equality and fairness will be goals for me.
- ▶ Preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.
- ▶ Make the law, the legal system, and other dispute resolution processes available to all.
- ▶ Practice law with a personal commitment to the rules governing our profession and to encourage others to do the same.
- ▶ Preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.
- ▶ Achieve excellence in our craft, so as to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.
- ▶ Practice law not solely as a business but as a calling in the spirit of public service.

R	Responsibility
E	Excellence
S	Service
P	Promotion of fairness
E	Education
C	Civility/Courtesy
T	Trustworthiness

Responsibility and Trustworthiness (integrity, honest, trust)

A lawyer should understand that:

1. Punctuality in appearance and filing deadlines promotes the credibility of a lawyer. Tardiness and neglect denigrate the individual as well as the legal profession.
2. Personal integrity is essential to the honorable practice of law. Each lawyer should ensure that clients, opposing counsel, public bodies and agencies, and the courts can trust that the lawyer will keep all commitments and perform the tasks assigned.
3. Personal honesty, as well as candid and honest communications, promote credibility with clients, opposing counsel, public bodies and agencies, and the court.
4. External monetary pressures that may cloud professional judgment should be resisted.

Education and Excellence

A lawyer should:

1. Make constant efforts to expand his/her legal knowledge to ensure familiarity with changes in the law that affect a client's interests.
2. Willingly take on the responsibility to enhance public understanding of the legal system by educating each client and the public regarding the principles underlying the legal system, and, as practitioners of a learned art, by conveying to everyone the importance of professionalism.
3. Attend continuing legal education programs to demonstrate a commitment to keep abreast of changes in the law.
4. As an experienced lawyer, accept the role of mentor and teacher, whether through formal education programs or individual mentoring of less experienced attorneys.

5. Understand that mentoring includes the responsibility for setting a good example for another lawyer as well as an obligation to ensure that each mentee learns the principles enunciated in these standards and adheres to them in practice.

Service

A lawyer should:

1. Serve the public interest by clearly communicating with clients, opposing counsel, public bodies and agencies, judges, and members of the public.
2. Give consideration to the impact on others when scheduling events. Reasonable requests for schedule changes should be accommodated if such requests do not impact the merits of the case.
3. Maintain an open dialogue with clients and opposing counsel.
4. Respond to all communications promptly, even if more time is needed to locate a complete answer. Delays in returning telephone calls or responding to emails may leave the impression that the call or the email was not important or that the message was lost and leads to an elevation of tension, frustration and less effective communication.
5. Keep a client apprised of the status of important matters affecting the client and inform the client of the frequency with which information will be provided. (Some matters require regular contact and other matters require only occasional contact).
6. Always explain a client's options or choices with sufficient detail to help the client make an informed decision.
7. Reflect a spirit of cooperation and compromise consistent with a client's interest and position in all interactions with opposing counsel, parties, staff, and the court.
8. Accept responsibility for ensuring that access to the legal system is available to all citizens and not just to those with financial means.

Promotion of fairness

A lawyer should:

1. Act fairly in all dealings as a means of promoting justice and respect for the rule of law.
2. Understand that an excess of zeal may undermine a client's cause and hamper the administration of justice. A lawyer can zealously advocate the client's cause in a manner that remains respectful, fair and civil.

3. Know that zeal requires only that the client's interests are paramount and therefore a lawyer should consider the value of negotiation and compromise to achieve a beneficial outcome. Yelling, intimidating, issuing ultimatums and threats, and using an "all or nothing" approach is bullying, not zealous advocacy.
4. Seek to maintain objectivity and understanding when advising a client so that the client receives a comprehensive view of the legal aspect of the situation presented to the lawyer.
5. Not allow any action or decision to be governed by a client's improper motive and challenge a client whose wishes are unethical or ill advised.
6. Negotiate in good faith and avoid engaging in protracted negotiations that do not serve the client's best interest. A lawyer should be open to alternative solutions and recommend such solutions when appropriate and in the client's best interest.
7. Use negotiating tactics and litigation tools to strengthen a client's case and avoid using such tactics and tools solely to harass, intimidate, or overburden an opposing party.
8. Explicitly note any changes made to documents submitted for review by opposing counsel. Fairness is undermined by attempts to insert or delete language without notifying the other party or his attorney.
9. Conduct civil, honest and open negotiations; draft clear and precise documents consistent with the understanding of the parties; and disclose to the other party obvious drafting errors inconsistent with those understandings.

Civility and Courtesy

A lawyer should understand that:

1. Professionalism requires civility in all dealings, showing respect for those with differing points of view.
2. Courtesy does not reflect weakness, but promotes effective advocacy by ensuring that parties have the opportunity to participate in the process without personal attacks or intimidation.
3. Maintaining decorum before public bodies and agencies and in the courtroom is neither a relic of the past nor a sign of weakness, but is an essential component of professionalism.
4. It is essential to prepare scrupulously for meetings, hearings and court appearances and show respect for public bodies and agencies, the court, opposing counsel, and the parties by courteous behavior and appropriate attire.
5. In all contexts, courtesy and respect should be shown to clients, colleagues, public

tribunals, support staff, and court personnel.

6. Hostility between clients is not a basis for an attorney to express hostility or disrespect to a party, opposing counsel, public bodies and agencies, or the court.
7. Patience and objectivity enable a lawyer to exercise restraint in volatile situations and to diffuse anger rather than to elevate the tension and animosity between parties or attorneys.

Supplemental Report of the Subcommittee on Professionalism Guidelines and Sanctions for Use by Judges

COMMENT TO NEW RULE 1-342

Rule 1-341 is intended to prevent abuses of the judicial process by claims or defenses that are frivolous or posed in bad faith, (See *United States Health Inc. v. State*, 87 Md. App. 116 (1991)).

Rule 1-342 authorizes the courts to enforce the standards of professionalism, which are reprinted in the appendix of these rules. The Due Process rights and procedures required under Rule 1-341, will also apply to Rule 1-342.

Due Process requires, at a minimum, before sanctions are imposed, notice and an opportunity to respond. *Zoravicovitch v. Bell Atlantic-Tricon Leasing Corp.*, 323 Md. 200, 209 (1991). The Court must make an evidentiary finding of a violation of the standards of professionalism before it imposes Rule 1-342 sanctions. See *Johnson v. Baker*, 84 Md. App. 521, (1990); *Legal Aid Bureau, Inc. v. Bishop's Garth Associates, Ltd.*, 75 Md. App. 214 (1988). See also *Hess v. Chalmers*, 33 Md. App. 541 (1976).

Rule 1-342 is intended to be an addition to those contempt powers that are within the existing authority of the courts.

REVISED FINAL REPORT OF THE SUBCOMMITTEE ON THE JUDGES' ROLE IN THE BAR AND WITH COMMUNITIES

Synopsis of Committee Work and Report

The Sub Committee began its work with an understanding from meetings with the bar that judges, who regularly participate in activities of the legal and general communities, demonstrate a higher level of professionalism. Our task was to foster that participation within the confines imposed upon judges by the Canons of the Maryland Code of Judicial Conduct (Maryland Rules 16-813 and 16-814) and other limitations of available time and resources.

The Sub Committee reviewed both state and federal canons as well as other information regarding judges' roles in institutional settings such as teaching or lecturing in law schools, continuing legal education seminars and Bar Association or Inns of Court membership or participation, as well as, non-legal community activity, including board membership, religious, political and social events and public speaking engagements in the community. The subcommittee completed its work and presented its recommendations to the Commission on June 1, 2005. On January 11, 2006 the Commission adopted the report and recommendations with only minor revisions.

The Sub Committee recommended initially that Maryland Rule 16-813 (Canon 4) be amended to explicitly state that judges are encouraged to engage in greater interaction with the bench, bar and legal and general communities.

The Sub Committee also perceived a need on the part of the judges for both initial and continuing education on where the lines of demarcation lay between permissible and impermissible activity when they move outside of their normal judicial role. To assist judges in that area the Sub Committee recommended that : (1) trial judges be provided recusal rules

and be regularly updated on changes in those rules; (2) issues of professionalism be a continuing and prominent part of all judicial training; (3) the judiciary be polled on the adequacy of the present system of responding to judicial inquiries involving ethical questions; (4) a system be established for a judge to obtain an advisory opinion from the Judicial Ethics Committee; (5) judges be encouraged to write and review their speeches in advance and to avail themselves of the resources of the Court Information office; and, finally, (6) that the awareness of the judges of judicial ethical issues and rules be increased by reinstating the former practice of forwarding a hard copy of each Judicial Ethics Report rather than the current electronic copy, which can easily be overlooked in the sea of emails received by each judge.

Introduction

Town hall meetings conducted throughout the state of Maryland revealed that attorneys felt a higher degree of professionalism from those judges that participated in the bar and the community. The Maryland Code of Judicial Conduct sets forth the guidelines for judges to uphold an appearance of dignity and respect in the community not only for themselves but the entire judicial system. The subcommittee was charged with the duty of analyzing judges' active participation with the bar and as involved members of their respective communities in light of any limitations on judicial behavior imposed by the Maryland Code of Judicial Conduct.

MARYLAND RULE 16-813 CJC Canon 1 (2006), addresses the honorability of a judge in society.² "An independent and honorable judiciary is indispensable to justice in our society. A judge shall observe high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to

² See Maryland Rule 16-813, CJC Canon 1.

further that objective.”³ A judge must maintain these standards at all times, both on and off the bench, especially when participating in community activities.⁴ The following discussion outlines specific community activities addressed by the Maryland Code of Judicial Conduct and the standards a judge should maintain when participating:

I. Extra-Judicial Activities

Canon 4(C) addresses judicial involvement in Charitable, Civic, and Government

Activities, though some Canons 2 and 5 are also pertinent as well. Canon 4(C) reads:

- (1) Except when acting in a matter that involves the judge or the judge’s interests, when acting as to a matter that concerns the administration of justice, the legal system, or improvement of the law, or when acting as otherwise allowed under Canon 4, a judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official.
- (2) Except as otherwise provided by law and subject to Canon 4(A), a judge may accept appointment to a governmental advisory commission, committee, or position.
- (3) A judge may represent his country, a state, or a locality on ceremonial occasions or in connection with cultural, educational, or historical activities.
- (4) (a) Subject to other provisions of this Code, a judge may be a director, member, non-legal adviser, officer, or trustee of a charitable, civic, educational, fraternal or sororal, law-related, or religious organization.
(b) A judge shall not be a director, adviser, officer, or trustee of an organization that is conducted for the economic or political advantage of its members.
(c) A judge shall not be a director, adviser, officer, or trustee of an organization if it is likely that the organization:
 - (i) will be engaged regularly in adversary proceedings in any court; or
 - (ii) deals with people who are referred to the organization by any court,
- (d)(i) A judge may not participate personally in:
 - (A) solicitation of funds or other fund raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise appellate or supervisory jurisdiction; or
 - (B) a membership solicitation that reasonably might be perceived as coercive or, except as permitted in Canon 4C(4)(d)(i)(A), is essentially a fund-raising mechanism.
- (ii) A judge shall not participate as a guest of honor or speaker at a fund-raising event.
- (iii) Except as allowed by Canon 4C(4)(d), a judge shall not use or lend the prestige of judicial office for fundraising or membership solicitation.
- (iv) A judge may:
 - (A) assist an organization in planning fund-raising;

³ Id.

⁴ Id.

- (B) participate in the investment and management of an organization's funds; and
- (C) make recommendations to private and public fund-granting organizations on programs and projects concerning the administration of justice, the legal system, or improvement of the law.

a. Boards

The Code permits judges to participate in community functions.⁵ Canon 2 mandates that a judge avoid all appearances of impropriety and comply with the law at all times, both on and off the bench.⁶ A judge who is a member of a board must not allow that activity to influence or appear to influence his/her decisions on the bench.⁷ Specifically, MARYLAND RULE 16-813 Canon 4(C), permits judges to contribute to the legal system and the community through participation on boards dedicated to such a mission. A judge may participate as a director, member, non-legal adviser, officer, or trustee of the Board.⁸ However, it prohibits board membership in organizations that regularly engage in adversarial proceedings in court or deal with people who are referred to the organization by any court.⁹ MARYLAND RULE 16-813 Canon 2(C) prohibits a judge from holding membership in an organization that practices discrimination on the basis of national origin, race, religion or sex.¹⁰ Therefore, a judge should not promote professionalism by appearing before Boards where a judge would be prohibited from joining the organization as a member or serving on the Board as prohibited by these canons. A judge participating in any capacity on a board must be sure to limit his/her participation so that it does not overlap with activities such as fundraising, which create the appearance of impropriety.¹¹ For his/her duties as a member of

⁵ See id. at Canon 4.

⁶ Id. at Canon 2.

⁷ Id. at Canon 4.

⁸ Id. at Canon 4(C)(4)(a).

⁹ Id. at Canon 4(C)(4)(c)(i),(ii).

¹⁰ Id. at Canon 2(C) cmt.

¹¹ Id.

a board, a judge may accept reimbursement when it does not give the appearance of impropriety and the compensation is reasonable.¹²

b. Governmental Advisory Commissions

Participation on governmental advisory commissions is also permitted by the Code.¹³ A judge that participates on such commissions renders invaluable services to the government. The same rules and regulations described above apply to a judge participating on these commissions.¹⁴ A judge participating on a governmental advisory commission must be careful not to create the appearance of impropriety or in any other way compromise the integrity of the judiciary.¹⁵ The Code allows participation on an advisory commission that contributes to the administration of justice or in some other way improves the legal system.¹⁶ As with board participation, a judge must ensure her participation does not influence his/her duties as a judge, and he/she may receive reasonable reimbursement for his/her participation.¹⁷

c. Bar Association Functions

Although there does not appear to be any specific language permitting judges to actively participate in Bar Association activities (other than socially, Bar Associations likely fall within the umbra of a “Law Related Organization”), by long standing tradition, members of the judiciary have participated in Bar activities.¹⁸ A judge participating in bar association

¹² Id. at Canon 4(H)

¹³ Id. at Canon 4(C)(2).

¹⁴ Id.

¹⁵ Id. at Canon 2.

¹⁶ Id. at Canon 4(C)(2).

¹⁷ Id. at Canon 4(H).

¹⁸ Id. at Canon 4(C)(4)(a).

functions must do so while abiding by the other provisions of the Code regarding reimbursement, prohibited activities, and avoiding appearances of impropriety.¹⁹

Not all judges agree with that position. Shortly after being sworn in, those judges tend to retreat from all contact with lawyers, apparently on the theory that any contact with lawyers might possibly raise the appearance of impropriety. In striving for the purity of Caesar's wife, they eliminate the leavening effect of interacting with lawyers who actually practice law. Many observers feel that the cure is worse than the diseases, particularly as the number of years on the bench increase.

d. Education Endeavors in the Community

The Code permits judicial involvement in educational endeavors in the community. The rules advocate that a judge should not be isolated from the community.²⁰ A judge contributing to educational endeavors in the community may represent the country, a state, or a locality in ceremonial occasions in connection with that activity.²¹ A judge's involvement in community functions must remain impartial.²² For example, a judge participating in educational endeavors in the community must avoid the appearance of impropriety and must not make discriminatory jokes or any other comments that would question the impartiality of the judge or the judiciary as a whole. Finally, as with the other activities, a judge contributing to educational endeavors may receive appropriate reimbursement for her contribution.²³ There are at least six published opinions of the Judicial Ethics Committee

¹⁹ See *supra* Part 1.a-b.

²⁰ *Id.* at Canon 4 (A) cmt.

²¹ *Id.* at Canon 4 (C)(3).

²² MARYLAND RULE 16-813 Canon 2.

²³ MARYLAND RULE 16-813 Canon 4(E).

that touch upon a judge's activities in the Community that may be useful to any further analysis of this issue.²⁴

e. Limitations on Extra-Judicial Activities

As a general rule, judges are permitted to participate in educational activities in the community both with regard to the law and other matters.²⁵ There are some important restrictions on judges that may affect their participation.

A judge must comply with the Canons in their conduct both in and out of court. In addition to the requirements of Canon 4, a judge must be certain that their outside educational activities do not cause them to comment upon active cases.²⁶ Teaching or other educational activities in the community are acceptable, provided that the judge's compensation for the activities is in compliance with both the Canons and the State Ethics Rules and the Financial Disclosure requirements.²⁷ The judge must also be sensitive to the non-political requirements of Canon 5. The most important limitation on a judge's teaching activities in the community is the language in the Canons that directs that the activity should not impinge upon either the judge's impartiality or interferes with the proper performance of judicial duties.²⁸

If the Professionalism Commission wishes to encourage judges to take a more active role in the education of the public as to civility in the practice of law and the use of the court system, the current Code of Judicial Conduct permits such activities with some restrictions, as noted. There are at least six published opinions of the Judicial Ethics Committee that

²⁴ See, e.g., Maryland Judicial Ethics Op. Nos. 42, 45, 52, 100, 116 and 2003-26)

²⁵ See Canon 4 generally.

²⁶ See *Id.* at Canon 3(B)(8).

²⁷ See *id.* at 4(H).

²⁸ See Canon 4(A).

touch upon a judge's activities in the Community that may be useful to any further analysis of this issue.²⁹

f. Political Events.

Canon 5(A) generally prohibits partisan political activities by a judge unless he/she is a candidate for election, re-election or retention to judicial office. It also requires that a judge resign when the judge becomes a candidate for a non-judicial office (Article 33 of the Maryland Declaration of Rights also prohibits a judge from holding a political office).³⁰ The only narrow exception is that a judge may continue to hold judicial office while a candidate for election to or delegate in a Maryland constitutional convention.³¹

Canon 5(B) authorizes a judge who is a candidate for election, re-election or retention to judicial office to engage in partisan political activity with respect to that candidacy, but while doing so, the judge: (1) must not act as a leader or hold an office in a political organization, (2) must not make a speech for a candidate or political organization or publicly endorse a candidate for non-judicial office, (3) must maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, independence and integrity of the judiciary, (4) must not allow any other person to do what the judge is prohibited from doing, (5) must not make pledges or promises of conduct in office other than the faithful and impartial performance of the adjudicative duties of the office and must not announce the judge's views on disputed legal or political issues, and (6) must not misrepresent the judge's identity or qualifications or other fact.³²

²⁹ See n. 23, *supra*.

³⁰ *Id.* at Canon 5(A)(2).

³¹ *Id.*

³² See *id.* at 5(B).

Although the MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(b) (2000) is broad enough even to prohibit a judge from endorsing another judge who also is a candidate, Maryland has long permitted a public endorsement by one judicial candidate of another judicial candidate.³³

Further, MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A) (1) (d) (2000), barring a judicial candidate from attending political gatherings was omitted in recognition of established ethics opinions and on grounds that because potential opponents will avail themselves of such opportunities for public exposure, judicial candidates should not be denied similar opportunity.³⁴ In making these recommendations, we are aware that there are first amendment issues raised herein that are being considered in courts around the country.³⁵ As a result, the Supreme Court expanded a judge's ability to speak in public.³⁶

g. Community Events.

MARYLAND RULE 16-813 Canon 4 permits a judge to engage in avocational, extra-judicial activities subject to three basic restrictions set forth in Section A of the Canon. Section A provides that a judge must conduct those activities so that they do not (1) cause a substantial question as to the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.³⁷

The Canon is drafted such that it contains certain “permissive” sections and other “prohibitive” sections.³⁸ In other words, it instructs judges as to what they may and may not do. However, the Canon does not contain any language that can be interpreted to actively

³³ See Md. Judicial Ethics Op. No. 20 (1974).

³⁴ See Md. Judicial Ethics Op. No. 63 (1978).

³⁵ See Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

³⁶ Id.

³⁷ See Maryland Rule 16-813 at Canon 4(A).

³⁸ See id generally.

encourage judges to participate in community events (although the Comments to the Canon indicate a judge should not become isolated from the community).³⁹

MARYLAND RULE 16-813 Canon 4 permits a judge to: (1) lecture, speak, teach and write, (2) accept an appointment to a governmental advisory commission, committee or position, (3) represent this country, a state or locality in connection with cultural, educational or historical activities, and (4) act as a director, member, etc. of a charitable, civic, educational, fraternal, sororal, law-related or religious organization. However, it prohibits a judge from serving in an organization that is conducted for the economic or political advantage of its members or will be engaged regularly in adversarial proceedings or deals with people who are referred to the organization by any court. It also prohibits a judge from soliciting funds or membership (subject to narrow exceptions), participating as a guest of honor or speaker at a fund-raising event, or using or lending the prestige of judicial office for fund-raising or soliciting membership.

h. Religious Gatherings.

MARYLAND RULE 16-813 Canon 4(C)(4)(a) permits a judge to act as a director, member, non-legal advisor, officer or trustee of a religious organization. Obviously, a judge's involvement in such an organization is subject to the same restrictions and limitations that apply to political, community and social activities.

i. Social Events.

MARYLAND RULE 16-813 Canon 4 permits a judge to engage in social and recreational activities. Once again, however, such activities are subject to a multitude of restrictions, all of which are aimed at preserving the integrity and independence of the judiciary and avoiding any appearance of impropriety, favoritism or prejudice.

³⁹ See id at Canon 4 (A) cmt.

For example, MARYLAND RULE 16-813 Canon 2 requires that a judge shall

- (1) avoid impropriety and the appearance of impropriety and act at all times in a manner that promotes the public confidence of the integrity and impartiality of the judiciary,
- (2) not hold membership in any organization that practices invidious discrimination on the basis of national origin, race, religion, or sex and
- (3) not allow judicial conduct to be improperly influenced or appear to be improperly influenced by a family, political, social, or other relationship and shall not convey or permit others to convey the impression that they are in a special position to influence judicial conduct.

II. ABA Model Code Section 3.7

The ABA's proposed section 3.7 provides similar guidelines to Maryland's Canon 4C for judges with respect to involvement in civil and charitable activities. The ABA's guidelines, however, use affirmative language, as opposed to the prohibitive language used in Maryland's Canon 4C. Such affirmative language is more encouraging of judicial involvement in the community and clearly delineates activities in which a judge may participate. This would prevent a judge from having to speculate which activities are violative of the canon, and err too much on the side of caution, avoiding community involvement entirely. Effectively, adopting the ABA's Rule 3.7 would encourage greater judicial participation in the community. The ABA's Model Rule 3.7 reads:

- (A) Subject to the requirements of Rule 3.1⁴⁰ a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations

⁴⁰ ABA Model Rule 3.1 states that a judge may engage in extrajudicial activities except as prohibited by law and the code as long as the judge does not participate in activities that will interfere with judicial duties, lead to frequent disqualification, appear to undermine the judge's impartiality, or involve the use of court resources.

not conducted for profit, including but not limited to the following activities:

- 1) Assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
- 2) Soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;
- 3) Soliciting membership from such an organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
- 4) Appearing or speaking at, receiving an award or other recognition at, being featured in the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fundraising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.;
- 5) Making recommendations to such a public or private fundgranting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
- 6) Serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:
 - a) Will be engaged in proceedings that would ordinarily come before the judge; or
 - b) Will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member

(B) A judge may encourage lawyers to provide pro bono public legal services.

III. Contents of a Judge's Speech

a. Pending and Potential Cases.

Canon 3 deals with the judiciary's performance of judicial duties and the importance of maintaining impartiality.⁴¹ Relative to pending and potential cases, judges are required to assure that every person who has a legal interest in the proceeding has the right to be heard and that during the proceeding,⁴² the judge shall neither initiate nor permit *ex parte*

⁴¹ *Id.* at Canon 3.

⁴² *Id.* at Canon 3(B)(6)(a).

communications on substantive matters without the knowledge and consent of all parties.⁴³

This prohibition does not extend to court personnel and to other judges whose function is to aid the judge in the exercise of his/her adjudicative responsibilities.⁴⁴ A judge is permitted to seek the advice of an outside expert so long as the parties are advised (1) the identity of the expert, (2) the substance of the advice and (3) afforded a reasonable opportunity to respond.⁴⁵ The most appropriate manner to obtain such advice would be an invitation for the expert to file a brief *amicus curiae*.⁴⁶

A judge should abstain from public comment regarding a pending or potential proceeding in any court.⁴⁷ This restriction should be required on the part of the court personnel subject to the judge's direction and control.⁴⁸ This restriction on speech does not apply to situations where the judge is making public statements in the course of official duties or when they are explaining procedures of the court for the purpose of public information.⁴⁹

MARYLAND RULE 16-813 Canon 3(A) mandates that a judge shall perform their judicial duties without bias or prejudice. This restriction includes, but it not limited to, bias and/or prejudice manifested through words or conduct based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.⁵⁰ Similarly, employees subject to the judge's direction and control are not permitted to manifest such bias and/or prejudice.⁵¹ The comment expands this idea to include a restriction against the judge

⁴³ Id. at Canon 3(B)(6)(b).

⁴⁴ Id. at Canon 3(B)(6)(f).

⁴⁵ Id. at Canon 3(B)(6)(e).

⁴⁶ Id. Canon 3(B)(6) cmt.

⁴⁷ Id. at Canon 3 (B)(8).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id. at Canon 3(A).

⁵¹ Id. at Canon (3)(C)(2).

engaging in conduct that could “reasonably be perceived” as sexual harassment.⁵² Again, this standard must be required by the judge to apply to the conduct of those subject to the judge’s direction and control.⁵³

b. Judge’s opinions regarding other legal matters.

Judges are permitted to speak about their opinions regarding legal matters, so long as it does not interfere with the proper performance of judicial duties, does not reflect adversely upon their impartiality and does not detract from the dignity of the office.⁵⁴ Subject to these restrictions, judges may also appear before and confer with public bodies or officials on matters concerning the judiciary and/or the administration of justice.⁵⁵ A judge can also serve on governmental advisory bodies that are devoted to improving the law, the legal system, and/or the administration of justice.⁵⁶ The rules also state that judges may represent their country, state or locality for ceremonies related to historical, educational or cultural activities.⁵⁷ However, the comments to the rule includes the committee’s concerns that judges will overextend themselves and, thus, suggests that judge’s participation before public bodies or officials should be strictly limited to the administration of justice.⁵⁸

The Minnesota Supreme Court adopted a canon of judicial conduct that prohibits a candidate for a judicial office from announcing his or her views on disputed legal or political issues.⁵⁹ In White, *supra*, the Supreme Court held that the canon violated the First Amendment.

⁵² MARYLAND RULE 16-813 Canon 3(A) cmt.

⁵³ Id. at 3(C)(2).

⁵⁴ Id. at Canon 4 generally.

⁵⁵ Id. at Canon 4 (C)(1).

⁵⁶ Id. at 4(C)(2).

⁵⁷ Id. at 4(C)(3).

⁵⁸ Id. at 4(C) cmt.

⁵⁹ See Minn. Code of Judicial Conduct Canon 5(A)(3)(d)(i)(2000).

IV. Recusal

The following is a review of the Code of Conduct for Judicial Appointees, MARYLAND RULE 16-814 Canon 3(D) (2006) in regard to the circumstances under which a judge should or must recuse themselves from a case after speaking or appearing before a bar association or community group promoting professionalism and later having someone from that bar association or community group appear before them as a judicial officer.

The essence of the need for recusal of judicial appointees is to avoid situations in which the impartiality of any judicial officer may come into question. Specifically, Canon 3(D)(1) provides that a judicial appointee shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.⁶⁰ MARYLAND RULE 16-814 Canon 3(D), has been expanded regarding situations in which a judge's impartiality might be questioned because a judge or a judge's family member has a significant financial interest in the subject matter of the controversy or is a party to the proceeding.⁶¹ The terminology section of MARYLAND RULE 16-814 is very specific as to the minimum standard for determining what constitutes a "significant financial interest."⁶² That standard was defined as "(1) Ownership of an interest as the result of which the owner has received within the past 3 years, is currently receiving, or in the future is entitled to receive, more than \$1,000.00 per year; or (2) (i) ownership of more than 3% of a business entity; or (ii) ownership of securities of any kind that represent, or are convertible into, ownership of more than 3% of a business entity."⁶³ The current comment has expanded this specific minimum standard to further

⁶⁰ Canon 3(D)(1).

⁶¹ Id. at 3(D)(1)(C).

⁶² See Maryland Rule 16-814, Terminology (k).

⁶³ Id. at Terminology (k)(A)-(C).

encompass situations where, “...[t]here may be situations that involve a lesser financial interest but nonetheless require recusal because of the judge’s own sense of propriety ... [c]onversely, there are situations where participation may be appropriate even though the ‘financial interest’ threshold is present.”⁶⁴ The rule provides that where a judge fails the “financial interest” threshold test, the judge must obtain an opinion from the Judicial Ethics Committee with regard to whether recusal is necessary, except in a situation where there is non-recusal by agreement, pursuant to MARYLAND RULE 16-814 Canon (E).

MARYLAND RULE 16-814 3(D)(1)(d)(i)-(iii) states that a judge must recuse himself or herself if the judge, the judge’s spouse, an individual within the third degree of relationship to either of them, or the spouse of such an individual party is a party to the proceeding, or a director, officer or trustee of a party: is acting as a lawyer in the proceeding, is known by the judge to have a financial interest that could be substantially affected by the proceeding, or is likely to be a material witness in the proceeding.⁶⁵

It should also be noted that MARYLAND RULE 16-814 (E) expands the situations in which recusal may be waived. Notwithstanding the basis for recusal, recusal may be waived if the parties and the lawyers agree, and the judge is willing to participate. Any such non-recusal agreement must be put on the record.⁶⁶

The more we encourage judges to speak or appear before bar associations or community groups the greater the likelihood that circumstances will arise causing judges to recuse themselves. This may create greater issues in jurisdictions with few or only one judge. But, it may be in those very jurisdictions that a judge could have the greatest impact in promoting professionalism.

⁶⁴ See Id. at Canon 3(D)(1)(c) cmt.

⁶⁵ Id. at Canon 3(D)(1)(d)(i)-(iii).

⁶⁶ Id. at 3(E).

V. Recommendations

- Provide either a Rules change or a comment to MARYLAND RULE 16-813 Canon 4 making more explicit the intent of the Court and the Commission that judges be encouraged to engage in greater interaction between the bench, the bar and the community.
- Maryland consider revising Canon 4 to conform to the new ABA Model Rule 3.7, which uses affirmative language setting forth extra-judicial activities in which a judge may participate.
- Train judges on recusal rules, and update sitting judges on any recusal rule changes.
- Continue to include issues of professionalism in all judicial training sessions, including promoting the use of a judicial self- assessment tool.⁶⁷
- Provide a system to obtain advisory opinions from the Judicial Ethics Committee and have the Commission take a poll to assess the adequacy of the present system.
- Encourage judges to prepare what they are going to say by writing it down and reviewing it before any speaking engagement and utilize the services of the Court Information Office.
- Increase judges' awareness of the opinions of the Judicial Ethics Report (e.g. Reinstate mailing to each judge, a hard copy of each Judicial Ethics report.)
- Judicial Canons 1,3 and 4 adequately describe indicia of professionalism for judges. Formally adopting additional indicia is unnecessary.⁶⁸
- Have Mel Hirshman write an article in "Justice Matters."

⁶⁷ see example of Judicial Self Assessment Tool attached

⁶⁸ The Subcommittee reviewed professionalism indicia from several states. A draft of possible indicia is attached.

Conclusion

The Maryland Code of Judicial Conduct recognizes the importance of the judiciary not only in the administration of justice but also in the community. It is important for the judiciary to assume an active role in community functions to promote justice, civility and professionalism, in addition to promoting and upholding the honor of the judiciary in the community. The Code provides the guidelines for judges to follow and assume an active role in the community without compromising the integrity of the bench. Community involvement in promoting professionalism is strongly encouraged and judges should seize any opportunity to become involved.

JUDICIAL PROFESSIONALISM

SELF-ASSESSMENT TOOL

TIME

1. Do I start my docket on time?
2. Do I allow each side sufficient time to present what they believe to be the factual basis of the case?
3. Am I available for conference calls and chambers conferences at the scheduled time?
4. Do I issue my opinions and memos in a timely fashion?
5. Do I complete the work that is requested of me each and every day?
6. Do I return large quantities of work assigned to me that is “not completed”?
7. Do I show respect for the time and schedule of others by setting appropriate deadlines for filing of briefs, scheduling of follow up appointments, etc?

SCHOLARSHIP

1. Do I take time to keep to date with recent case law?
2. Do I attend continuing judicial education programs and pay attention while attending?
3. Do I offer my services as instructor/panel member for CLE programs for attorneys?
4. Do I mentor young attorneys who appear before me?

DEMEANOR

1. Do I conduct myself with the appropriate level of dignity in public settings?
2. Do I project dislike for one class of litigants such as Defendants in Med/Mal cases, or Defendants in criminal cases?
3. Do I suggest to counsel that the decision has been made prior to the conclusion of the presentation of the evidence?
4. Do I project dislike for particular areas of law, such as family law, estate, criminal, etc, that forms a regular part of the docket?
5. Do I maintain an appropriate level of sobriety in all public settings?
6. Do I explode in anger in public or in the courtroom when a case is not presented as I would like?
7. Do I use appropriate salutations and surnames when addressing attorneys and parties in the courtroom?
8. Am I courteous and respectful in my dealings with attorneys, litigants, and witnesses, both in and out of court?
9. Am I patient with unrepresented persons?
10. Am I patient with inexperienced attorneys?
11. Am I sensitive to persons from other cultures?
12. Am I sensitive to persons with disabilities?
13. Do I insist that attorneys and litigants and my staff show respect to others in my courtroom?
14. Do counsel that are regularly in my courtroom feel comfortable that I will abide by the standard rules of procedure or are they in fear of my inconsistent application of the rules?

DILIGENCE

1. Do I give each case the level of attention that is merited?
2. Do I research unfamiliar areas of law to assure that my opinion is well-reasoned?
3. DO I take time to study new statutes and case law?
4. Have I given each case my undivided attention throughout the presentation of the case?

INTEGRITY

1. Have I avoided the appearance of impropriety in my personal and professional life?
2. Do I publicly discuss cases that are before me?
3. Have I timely and accurately filed all ethics reports and financial disclosure forms?
4. Have I accepted invitations to events as a non-paying guest from specific attorneys who appear before me?
5. Have I accepted gifts from successful litigants or attorneys?
6. Have I accepted invitations to attend partisan political events when I am not currently allowed to campaign?
7. Have I maintained close personal relationships with attorneys who regularly appear in the courtroom?
8. Have I identified myself as a member of the judiciary in order to gain special considerations with police officers, and or commercial or other establishments?
9. Have I engaged in ex parte communications with one side/party to a case?
10. Before engaging in settlement discussions with counsel, have I gotten the permission from both sides, if the matter was to be heard in my courtroom?
11. Have I bullied either side into accepting a proposed settlement, regardless of its soundness or likelihood of the success of the claim?
12. Have I strenuously persuaded counsel who appear before me on a regular basis to participate in charitable donations?
13. Have I strived to not only be fair, but to give the appearance of being fair?
14. Have I maintained my neutrality throughout the entire case?
15. Did I listen to all parties, and did I let them know that I was listening?
16. Did my actions today demonstrate my aspirations to make the court I serve a place of truth and justice?

COLLEAGUES

1. Am I available to my fellow judges for consultation?
2. Do I share information and resources freely with other members of the bench?
3. Am I a resource for newer judges or for judges who are less familiar with an area of law than I?
4. Have I made it known that I am not interested in hearing or sharing gossip regarding other judges or employees of the court?
5. Have I spread gossip about colleagues?

6. Do I treat my colleagues with the level of respect that I am entitled to receive?
7. Do I speak of my colleagues in respectful ways to others?
8. Do I publicly show support for the court and its policies?
9. Do I refrain from publicly showing my support for any candidate for judicial election?
10. Do I privately bolster my fellow judges when I am aware they are suffering a personal crisis or loss?
11. Do I offer myself as a sounding board to other judges?
12. Do I actively participate in bench meetings to enhance the efficiency of my court?

EPILOGUE

Aside from going to work, what have I done to enhance the quality of justice in my courtroom?